rights of contesting parties, or to put it in other words if there is a *lis* ordinarily there will be a duty on the part of the said authority to act judicially[19]. Applying the aforesaid test and scrutinizing the provisions of Secs. 68-C and 68-D of the Motor Vehicles Act and of Rules 8, 9 and 10 of the Act. it is obvious that the Act imposes a duty on the State Government to decide the act judicially in approving or modifying the scheme proposed by the transport undertaking ".

Adopting the above view the majority of the judges have held in the instant case that Secs. 68-C and 68-D comply with the criteria of a judicial act[20]. In the present case pursuant to the rules the Minister who was in charge of transport had made an order directing the Secretary to Government to hear objections filed under S. 68 D against the scheme proposed by the State Transport Department and the Secretary to the said department gave a personal hearing to the parties who had filed objections and the entire material recorded by him was placed before the Minister who made his order approving the scheme and the order was issued in the name of the Governor, authenticated by the Secretary in charge of the Transport Department. The court held though a hearing was given, it was vitiated by bias since it was the Secretary of the Transport Department who was an interested party that held the hearing. The Act and rules framed thereunder imposed a duty on the State Government to give a personal hearing. But the procedure prescribed by the rules imposed a duty on the Secretary to hear and the Minister to decide and this divided responsibility was destructive of the concept of judicial hearing. In this view the majority quashed the order formulating the scheme.

But Wanchoo, J., in his dissenting judgment (Sinha, J., agreeing) held that the enquiry under S. 68 D was clearly administrative. The dispute before the State "Government was only whether the scheme that was proposed (for a State Corporation) was efficient, adequate, economical and properly co-ordinated for road transport service and in the interest of the public. There was no question of any issue to be tried as between the claim of the objectors and the State transport undertaking. In this sense there was no *lis* at all. Following the principle laid down in *Local Government Board* v. *Arlidge*[21]. Wanchoo, J., held that it was not essential that the Minister must hear so long as a hearing was given by an officer of the Government. This being an administrative hearing came within the executive power of the State and there would be no infirmity if the Governor, who, in view of the provisions of the General Clauses Act, was the State Government authorised through the Minister a subordinate officer to give the hearing. The bifurcation of the function was needed for efficiency. The Government has in a case of this kind to hear objections against a scheme prepared by its own limbs. In these circumstances if the head of the Department, namely the Secretary, hears the orai objections on a scheme prepared by some one in that department who would necessarily be under him, it does not follow that the Secretary is an improper person to give the hearing. The Secretary makes the notes of hearing and conveys the arguments to the Minister and as the matter is purely administrative the procedure cannot be said to be improper[95]. Such a procedure was upheld by English courts when considering the Provisions of

19. *Ibid.* Relying on : *Kushaldas Advani* A.I.R. 1950 S.C. 222; *Nagendra Nath Bora* v. *Commissioner of Hills Division,* A.I.R. 1958 S.C. 398; *Express Newspapers Ltd.* v. *Union of India* A.I.R. 1958 S.C. 578.
20. *Ibid.* Distinguishing (1948) A.C. C. 87.
21. 1915 A.C. 120.

the Town and Country Planning Act, 1944, where such bifurcation of function was recognised as leading to administrative efficiency[22].

It must be admitted there is much force in the convincing stand taken by the dissenting judges Wanchoo and Sinha. The enquiry under S. 68-D cannot be termed quasi judicial. The view of the majority making the court interfere on the plea that the enquiry was quasi judicial is open to serious doubt. Subba Rao, J., distinguished the position of the Minister under the New Towns Act on the reasoning of Robson[23]. Robson says, "It should have been obvious from a cursory glance at the New Towns Act that the rules of natural justice could not apply to the Minister's action in making an order, for the simple reason that the initiative lies with him. His role is not to consider whether an order made by a local authority should be confirmed nor does he have to determine a controversy between a public authority and private interests. The responsibility of seeing that the intention of Parliament is carried out is placed on him".

Griffith and Street[24] have stated, "It is submitted that the thoroughness with which the courts analysed the statutes in *Errington* v. *Minister of State*[25], *Robinson* v. *Minister of Town and Country Planning*,[26] *B. Johnsons & Co., Ltd.* v. *Minister of Health*[1], *Franklins case*[2], and the emphasis which they have placed on the fact that their decisions have been based solely on the statute under consideration makes such an approach inevitable".

Subba Rao, J., therefore opined that while in England the enquiry was merely to inform the mind of the Minister for a decision to be made by him, in the instant case *G. Nageswara Rao* v. *A. P. S. R. T. Corporation*[3] it was an issue between the minister and the objectors. It is submitted this view appears not correct since the issue was as to the efficiency and practicability of the new scheme to promote a State transport. The issue was not at all as between State transport and private objectors. The reasoning of Wanchoo, J., on this point makes it clear.

The mode of performing quasi judicial acts by administrative tribunals has been the subject of judicial decisions in England as well as in India. In *Local Govt. Board* v. *Arlidge*[4] in the context of the Housing Town Planning etc., Act, 1909, the following was stated :—

"..... When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias." Other decisions also point to the need for observance of the Rules of natural justice in quasi judicial proceedings[5].

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22. *See also Franklin* v. *Minister of Town and Country Planning*, 1948 A.C. 87; *Robinson* v. *Minister of Town & Country Planning*, 1947-1. All. E.R. 851; *Phoenix Assurance Co. Ltd.* v. *Minister of Town and Country Planning*, (1947) 1 All. E.R. 454.
23. *See* 'Justice and Administrative Law', p. 583.
24. 'Principles of Administrative Law', p. 178.
25. (1935) 1 K.B. 249.
26. (1947) 1 All. E.R. 85.

1. (1947) 2 All. E.R. 395.
2. (1948) A.C. 87.
3. A.I.R. 1959 S.C. 300.
4. 1915 A.C. 120.
5. *New Prakash Transport Co. Ltd.* v. *New Sawarna Transport Coy. Ltd.*, A.I.R. 1957 S.C. 232; *Nagendra Nath Bora* v. *Commr. of Hills Division*, A.I.R. 1958 S.C. 398; *Rex* v. *Sussex Justices Ex-parte McCarthy* (1924) 1 K.B. 256; *Ex-parte Perkins*, (1927) 2 K.B. 475; Franklin's case 1948 A.C. 87.

In *Kushaldoss* v. *Advani*[6], Das, J., (later C.J.) summarised what constituted a quasi judicial act thus :

"The principles as I apprehend them are :

(*i*) that if a statute empowers an authority not being a court in the ordinary sense to decide dispute arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary, it is the duty of the authority to act judicially and the decision of the authority is a quasi judicial act; and

"(*ii*) that if a statutory authority has power to do any act which will prejudicially affect the subject, then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet yet be a quasi judicial act provided the authority is required by the statute to act judicially.

"In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi judicial act if the authority is neverthless required by the statute act judicially."

In *Rameshwar Proshod* v. *Commissioners, Land Reforms and Jagirs, M. B.*[7] (now M. P.) the Supreme Court has held that when no property passed to the petitioners who had only permissive licence to work in the forests and had unauthorised extension of contracts by forest officers, they cannot sustain any petition under Art. 32 for an infringement of their supposed right to hold and dispose of property in the forest trees.

Where a new point is not raised in the petition but put forward in a rejoinder to which the respondents had no opportunity to reply, it cannot be considered in the proceedings under Art. 32[8].

In *K. K. Kochunni Mopil Nair* v. *State of Madras*[9] the Sthanam filed a petition under Art. 32 seeking a mandamus against the enforcement of the Madras Marumakkathayam (Removal of Doubts) Act 32 of 1955 in that the provisions therein affected his sole right to the Sthanam property in that it yielded a right of partition to junior members of the Tarawad. The Supreme Court made an important pronouncement in respect of the following matters :—

(*I*) *Is mere existence of adequate remedy a bar to a petition under Art.* 32 ?

The court held it was not a bar and observed :

"The present petitions are under Art. 32 of the Constitution which is itself a guaranteed right. In *Rashid Ahmed* v. *Municipal Board, Kairana* (1950 S. C. R. 566) this court repelled the submission of the Advocate-General of U. P. to the effect that as the petitioner has an adequate remedy by way of appeal this court should grant any writ in the nature of the prerogative writ

6. A.I.R. 1950 S.C. 222 at 260.
7. A.I.R. 1959 S.C. 498.
8. *M. S. M. Sharma* v. *Shri Krishna Sinha*; A.I.R. 1959 S.C. 395.
9. Petns. No. 443-55 and others, S.C. Judgment on 4th March 1959.

of mandamus or certiorari and observed, 'There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs but the power given to this court under Art. 32 are much wider and are not to be confined to issuing prerogative writs only."

"Further even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs as an application under Art. 226—as to which we say, nothing now—this Court cannot on a similar ground decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right. It has accordingly been held by this Court in *Romesh Thapper* v. *The State of Madras* (1950 S. C. R. 594) that under the Constitution this court is constituted as the protector and guarantor of fundamental rights and it cannot consistently with the responsibility so laid upon it refuse to entertain an application seeking the protection of this court against infringement of such rights, although such applications are made to this court in the first instance, without resort to a High Court having concurrent jurisdiction in the matter. The mere existence of an adequate legal remedy cannot *per se* be a good and sufficient ground for throwing out a petition under Art. 32, if the existence of a fundamental right and a breach, actual or threatened, of such right alleged is *prima facie* established in the petition". In he instant case[9] there was a pending suit by one of the respondents and the argument advanced was that the petitioner should seek his rights in that suit. The Supreme Court has held the petitioner can, despite the suit, claim redress under Art. 32, and the preliminary objection as to the maintainability of the petition was overruled.

(II) *Is the petition maintainable in the obsence of State action?*

On this question the Supreme Court held[9], "The petitioner's grievance is certainly against the action of the State which by virtue of the definition of the term given under Art. 12 of the Constitution includes the Madras Legislature and it cannot certainly be said that the subject-matter of the present petitions comprise disputes between two sets of private individuals unconnected with any state action. Certainly disputes are between the petitioners on the one hand and the State and persons claiming under the State or under any law made by the State on the other hand. In our opinion these petitions are not governed by our decision in *P. D. Shamdasini's case* (1952 S.C.R. 391)."

On the question whether any overt act of State is necessary before impugning the statute it may be stated there was a suit pending and one of the parties invoked in his aid the provisions of the impugned statute. The court stated further, ".....Quite conceivably an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms and without any further overt act being done. The impugned Act is said to be an instance of such an enactment. In such a case the infringement of the fundamental right is complete *co instanti* the passing of the enactment and therefore there can be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Art. 32. To say that a person whose fundamental right has been infringed by the mere operation of an enactment is not entitled to invoke the jurisdiction of this Court under Art. 32 for

the enforcement of his right, will be to deny him the benefit of a salutary constitutional remedy which is itself his fundamental right."[10]

(III) *Can a declaratory order lie under Art.* 32 ?

This question was answered in the affirmative by the Supreme Court in *K. K. Kochunni's case*[9]. their Lordships stated :

" The powers given to this Court by Art. 32 are much wider and are not confined to the issue of prerogative writs only . . . . . On a consideration of the authorities[11] it appears to be well-established that this Court's powers under Art. 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party."

(IV) *Can disputed questions of fact be gone into under Art.* 32 ?

The most significant pronouncement in the instant case[9] was the answer to the above question. If Art. 32 is to be an efficacious and real remedy parties should be heard on disputed questions of fact also instead of being directed to a suit. The Supreme court said[10],

" Clause (2) of Art. 32 confers powers on this Court to issue directions or orders or writs of various kinds referred to therein. This Court may say that any particular writ asked for is or is not appropriate or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition. In both cases this Court decides the petition on merits. But we do not countenance the proposition that as an application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention of the learned counsel, we would be failing in our duty as the custodian and protector of the fundamental rights. We are not unmindful of the fact that the view that this court is bound to entertain a petition under Art. 32 and to decide the same on merits may encourage litigants to file many petitions under Art. 32 instead of proceedings by way of a suit. But that consideration cannot by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may *prima facie* appear to have been infringed. Further questions of fact can and very often are dealt with on affidavit[12]. The Court may in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original side of the High Courts of Bombay and Calcutta or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involves disputed questions of fact."

It may be added that this procedure of going into disputed questions

10. *State of Bombay* v. *United Motors,* 1953 S.C.R. 1069; *Himmatlal Harital Mehta* v. *The State of M.P.,* 1954 S.C.R. 1122 followed.
11. Refers to *Chiranjit Lal* v. *Union of India,* 1950 S.C.R. 869 at 900; *Rashid Ahmed* v. *Municipal Board, Kairana* (1955) 1 S.C.R. 250; *Ebrahim Vazir Mavat* v. *State of Bombay,* 1954 S.C.R. 933 at 941; *Maharaj Umeg Singh* v. *State of Bombay,* (1955) 1 S.C.R. 164.
12. *Chiranjit Lal's* case 1950 S.C.R. 869; *Kathi Raning Rewat* v. *The State of Saurashtra,* (1952) S.C.R. 435; *Ram Krishna Dalmia* v. *Shri Justice S. R. Tendalkar,* A.I.R. 1958 S.C. 538 referred to.

of fact may also be salutary if it is applied in the case of proceedings under Art. 226 before High Court also.

Article 32 in Jammu and Kashmir.

The Constitution Application to Jammu and Kashmir Order 1954[13], has omitted clause (3) in Art. 32 and has inserted a new clause 32 (2-A) which postulates :—

Art. 32 (2-A) :

"Without prejudice to the powers conferred by clauses (1) and (2) the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate case any Government within those territories, directions or orders, or writs including writs, in the nature of **Habeas Corpus, Mandamus,** prohibition, **Quo warranto** and Certiorari or any of them, for the enforcement of any of the rights conferred by this Part."

Judicial Interpretation.

A petition under Art. 32 (2-A) as applied to the State of Jammu and Kashmir is maintainable and cannot be thrown out where there is no deliberate suppression of facts made by the petitioner in his petition[14]. It is enough if the facts are clear enough and not so severely disputed as cannot satisfactorily be determined in a writ proceeding under Art. 32 (2-A)[14].

Where the Government removed petitioner from the Chairmanship of Town Area Committee the High Court can interfere only if an authority which is bound to follow the provisions of a statute acts in contravention of these provisions[15]. The court will only see if the petitioner has or has not received the equal protection of law[15].

In a writ proceeding against Election Commissioner, the Government is a necessary party[16]. Where results of examinations held in 1951 are withheld and examinees are informed of the reason in 1955, since the examination was one of the pre-Constitution period no writ will lie[17]. A dismissal of Government servant prior to the promulgation of the Jammu and Kashmir (Application) Order cannot be remedied by a writ, as the Constitution cannot be applied retrospectively[1].

Where an order of conviction for contempt is manifestly illegal contravening Sec. 481, Cr. P. C., it is a fit case for a writ action under Sec. 103 of the Jammu and Kashmir State Constitution[1].

Article 32 (2-A) as applied to the State of Jammu and Kashmir does not cover contractual rights and their enforcement. It is restricted only to fundamental rights[2].

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13. Published in the Gazette of India (Extraordinary) Part II, S. 3, p. 821 dated 14 May 1954.
14. *Ghulam Rasul* v. *State of J. & K.*, A.I.R. 1956 J. & K. 17.
15. *Jwala Prasad* v. *State of J. & K.*, A.I.R. 1956 J. & K. 32.
16. *Ram Anyan* v. *Election Commr.*, A.I.R. 1957 J. & K. 45.
17. *Mahammad Sheriff Hamdani* v. *Central Exam. Board* A.I.R. 1957 J. & K. 13.
1. *Meeraj-ud-Din* v. *Director of Kashmir Food Control,* A.I.R. 1957 J. & K. 25.
2. *Harbans Singh* v. *Conservator of Forests and another,* A.I.R. 1959 J. & K. 10 relies on A.I.R. 1953 S.C. 250.

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954[3]

S. R. O. 1610—The following Order made by the President is published for general information :—

In exercise of the powers conferred by clause (1) of Article 370 of the Constitution, the President with the concurrence of the Government of the State of Jammu and Kashmir, is pleased to make the following order :—

1. (1) This Order may be called The Constitution (Application to Jammu and Kashmir) Order, 1954.

(2) It shall come into force on the fourteenth day of May, 1954, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.

2. The provision of the Constitution which, in addition to Article 1 and Article 370, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows :—

(1) The Preamble.

(2) Part I.

To Article 3, there shall be added the following further proviso namely:—

"Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of the State shall be introduced in Parliament without the consent of the Legislature of that State."

(3) Part II.

(a) This Part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir as from the 26th day of January, 1950.

(b) To Article 7, there shall be added the following further proviso, namely :—

" Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir who, after having so migrated to the territory now included in Pakistan, returns to the territory of that State under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India."

(4) Part III.

(a) In Article 13, references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(b) In Clause (4) of Article 15, the reference to Scheduled Tribes shall be omitted.

(c) In Clause (3) of Article 16, the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir.

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3. Published in the Gazette of India (Extraordinary), Part II, Sec. 3, page 821, dated 14th May, 1954.

(d) In Article 19, for a period of five years from the commencement of this Order :—

(i) In Clauses (3) and (4) after the words "in the interests of" the words "the security of the State or" shall be inserted ;

(ii) in Clause (5), for the words " or for the protection of the interests of any Scheduled Tribe " the words " or in the interests of the security of the State " shall be substituted; and

(iii) the following new clause shall be added, namely :—

' (7) The words " reasonable restrictions " occurring in Clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable."

(e) In Clauses (4) and (7) of Article 22 for the word " Parliament " the words " the Legislature of the State " shall be substituted.

(f) In Article 31, Clauses (3), (4) and (6) shall be omitted; and for Clause (5), there shall be substituted the following clause, namely :—

" (5) Nothing in Clause (2) shall affect :—

(a) The provision of any existing law; or

(b) The provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty; or

(ii) for the promotion of public health or the prevention of danger to life or property; or

(iii) with respect to property declared by law to be evacuee property."

(g) In Article 31-A, the proviso to Clause (1) shall be omitted ; and for sub-clause (a) of clause (2), the following sub-clause shall be substituted namely :—

'(a) "estate" shall mean land which is occupied or has been let for agricultural purpose or for purposes subservient to agriculture, or for pasture and includes :—

(i) sites of buildings and other structures on such land ;

(ii) trees standing on such land;

(iii) forest land and wooded waste;

(iv) area covered by or fields floating over water ;

(v) sites of jandars and gharats ;

(vi) any jagir, inam, muafi or makarrai or other similar grant; but does not include—

(i) the site of any building in any town, or town area or village abadi or any land appurtenant to any such building or site;

(ii) any land which is occupied as the site of a town or village ; or

(iii) any land reserved for building purposes in a municipality or notified area or cantonment or town area or any area for which a town planning scheme is sanctioned."

(h) In Article 32, Clause (3) shall be omitted; and after Clause (2), the following new clause shall be inserted, namely :—

"(2-A) Without prejudice to the powers conferred by Clauses (1) and (2), the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate case any Government within those territories, directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by this Part."

(i) In Article 35—

(i) reference to the commencement of the Constitution shall be construed as reference to the commencement of this Order ;

(ii) In Clause (a) (i), the words, figures and brackets "Clause (3) of Article 16, Clause (3) of Article 32", shall be omitted; and

(iii) after Clause (B) the following Clause shall be added, namely :—

"(c) no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said order, except as respects things done or omitted to be done before the expiration thereof."

(j) After Article 35, the following new Article shall be added, namely :—

"35-A. *Saving of laws with respect to permanent residents and their rights.*—Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,—

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immovable property in the State ;

(iii) settlement in the State ; or

(iv) right to scholarships and such other forms of aid as the State Government may provide ;

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

(5) Part V.

(a) In Articles 54 and 55, references to the elected members of the House of the People and to each such member shall include references to the representatives of the State of Jammu and Kashmir in that House;

(b) In the proviso to Clause (1) of Article 73, the words "or in any law made by Parliament" shall be omitted.

(c) Article 81 shall apply subject to the modification that the representatives of the State in the House of the People shall be appointed by the President on the recommendation of the Legislature of the State.

(d) In Article 134, Clause (2), after the words "Parliament may" the words "on the request of the Legislature of the State" shall be inserted.

(e) Articles 135, 136 and 139 shall be omitted.

(f) In Articles 149 and 150, references to the States shall be construed as not including the State of Jammu and Kashmir.

(g) In Article 511, Clause (2) shall be omitted.

(6) Part XI.

(a) In Article 246, the words, brackets and figures "Notwithstanding anything in Clauses (2) and (3)" occurring in Clause (1) and Clause (2), (3) and (4) shall be omitted.

(b) Articles 248 and 249 shall be omitted.

(c) In Article 250, for the words "to any of the matters enumerated in the State List," the words "also to matters not enumerated in the Union List" shall be substituted.

(d) In Article 251, for the words and figures, "Articles 249 and 250", the word and figures "Article 250" shall be substituted and the words "under this Constitution" shall be omitted; and for the words "under either of the said articles", the words "under the said article" shall be substituted.

(e) To Article 253, the following proviso shall be added, namely :—

"Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State."

(f) In Article 254, the words, brackets and figure "or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject or the provisions of Clause (2)" and the words "or as the case may be, the existing law", occurring in Clause (1), and the whole of clause (2) shall be omitted.

(g) Article 255 shall be omitted.

(h) Article 256 shall be renumbered as clause (1) of that article, and the following new clause shall be added thereto, namely :—

"(2) The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State; and in particular, the said State, shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined, by an arbitrator appointed by the Chief Justice of India."

(i) Article 259 shall be omitted.

(j) In Clause (2) of Article 261, the words "made by Parliament" shall be omitted.

(7) Part XII.

(a) Clause (2) of Ariticle 267, Article 273, Clause (2) of Article 283, Articles 290 and 291 shall be omitted.

(b) In Articles 266, 282, 284, 298, 299 and 300, references to the State or States shall be construed as not including references to the State of Jammu and Kashmir.

(c) In Articles 277 and 295, reference to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(8) Part XIII.

(a) In Clause (1) of Article 303, the words "by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule" shall be omitted.

(b) In Article 306, references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(9) Part XIV.

In Article 308, after the words "First Schedule", the words "other than the State of Jammu and Kashmir" shall be added.

(10) Part XV

(a) Article 324 shall apply only in so far as it relates to elections to Parliament and to the offices of President and Vice-President.

(b) Articles 325, 327, 328 and 329 shall be omitted.

(11) Part XVI.

(a) In Article 330, references to the "Scheduled Tribes" shall be omitted.

(b) Articles 331, 332, 333, 336, 337, 339 and 342 shall be omitted.

(c) In Articles 334 and 335, references to the State or the States shall be construed as not including references to the State of Jammu and Kashmir.

(12) Part XVII.

The provisions of this Part shall apply only in so far as they relate to—

(i) the official language of the Union;

(ii) the official language for communication between one State and another, or between a State and the Union; and

(iii) the language of the proceedings in the Supreme Court.

(13) Part XVIII.

(a) To Article 352, the following new clause shall be added, namely :—

"(4) No proclamation of emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects Article 354) unless it is made at the request or with the concurrence of the Government of that State."

(b) Articles 356, 357 and 360 shall be omitted.

(14) Part XIX.

(a) In Article 361, after Clause (4), the following clause shall be added, namely :—

" (5) The provisions of this article shall apply in relation to the Sadar-i-Riyasat of Jammu and Kashmir as they apply in relation to a Rajpramukh, but without prejudice to the provisions of the Constitution of the State."

(b) Articles 362 and 365 shall be omitted.

(c) In Article 366, Clause (21) shall be omitted.

(d) To Article 367, there shall be added the following clause, namely :—

" (4) For the purposes of this Constitution as it applied in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State ;

(b) references to the Government of the said State shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers;

(c) references to a High Court shall include references to the High Court of Jammu and Kashmir;

(d) references to the Legislature or the Legislative Assembly of the said State shall be construed as including references to the Constituent Assembly of the said State ;

(e) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and

(f) references to the Rajpramukh shall be construed as references to the person for the time being recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat.

(15) Part XX.

To Article 368, the following proviso shall be added, namely :—

" Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Clause (1) of Article 370."

(16) Part XXI.

(a) Articles 369, 371, 373, Clauses (1), (2), (3) and (5) of Article 374 and Articles 376 to 392 shall be omitted.

(b) In Article 372—

(i) Clauses (2) and (3) shall be omitted.

(ii) references to the laws in force in the territory of India shall include references to hidayats, ailans, ishtihars, circulars, robkars, irshads, vadashts, State Council Resolutions, Resolutions of the Constituent Assembly and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and

(iii) references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(c) In Clause (4) of Article 374, the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board constituted under the Jammu and Kashmir Constitution Act, 1996, and references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

(17) Part XXII.

Articles 394 and 395 shall be omitted.

(18) First Schedule.

(19) Second Schedule.

Paragraph 6 shall be omitted.

(20) Third Schedule.

Forms V, VI, VII and VIII shall be omitted.

(21) Fourth Schedule.

(22) Seventh Schedule.

(a) In the Union List—

(i) for entry 3, the entry "3. Administration of cantonments" shall be substituted;

(ii) entries 8, 9, 33 and 34 the words "trading corporations including" in entry 43, entries 44, 50, 52, 54, 55, 60, 67, 78 and 79, the words "inter-State migration" in entry 81, and entry 97 shall be omitted.

(iii) for entry 53, the entry "53. Petroleum and Petroleum Product, but excluding the regulation and development of oilfields and mineral oil resources; other liquids and substances, declared by Parliament by law to be dangerously inflammable" shall be substituted; and

(iv) in entries 72 and 76, the reference to the States shall be construed as not including a reference to the State of Jammu and Kashmir.

(b) The State List and the Concurrent List shall be omitted.

(23) Eighth Schedule.

(24) Ninth Schedule.

After entry 13, the following entries shall be added, namely :—

"14. The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of S. 2007).

"15. The Jammu and Kashmir Restitution of Mortgaged Properties Act (No. XVI of S. 2006).

"16. The Jammu and Kashmir Tenancy Act (No. 11 of S. 1980).

"17. The Jammu and Kashmir Distressed Debtors Relief Act (No. XVII of S. 2006).

"18. The Jammu and Kashmir Alienation of Land Act (No. V of S. 1995).

"19. Order No. 6-H of 1951, dated 10th March, 1951, regarding Resumption of Jagirs and other assignments of land Revenue etc.

"20. The Jammu and Kashmir State Kuth Act (No. 1 of S. 1978).

APPELLATE REMEDIES

It is not within the scope of this treatise to elaborate on the remedies available to the aggrieved party after an unsuccessful resort to either Article 32 or Article 226. Nevertheless a skeleton picture is sought to be provided hereunder giving the salient principles pertaining to the provisions of Articles 132 to 137 of the Constitution. We confined the commentary to Fundamental Rights and the primary constitutional remedies available to any person for a breach of such rights under Articles 32 and 226.

The text of Articles 132 to 137 is here under given :—

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.

Article 132.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.

(2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.

(3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground.

Explanation.—For the purposes of this article, the expression " final order " includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Appellate jurisdiction of Supreme Court in appeal from High Courts in regard to civil matters.

Article 133.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value ; or

(c) that the case is a fit one for appeal to the Supreme Court ;

and, where the judgment, decree or final order appealed from affrms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court .

Appellate jurisdiction of Supreme Court in regard to criminal matters.

Article 134.—(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death ; or

(c) certifies that the case is a fit one for appeal to the Supreme Court :

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.

Article 135.—Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law.

Special leave to appeal by the Supreme Court.

Article 135.—(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Review of judgments or orders by the Supreme Court.

Article 137. Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

COMMENTS

Scheme of Articles 132—136.

The Appellate jurisdiction of the Supreme Court may be analysed thus :

1. Appeals pertaining to constitutional questions.
   (a) Art. 132 (1) : By certificate of High Court.
   (b) Art. 132 (2) : By special leave of the Supreme Court.
2. Other appeals :
   (a) Art. 133 : Civil appeals.
   (b) Art. 134 : Criminal appeals.

3. Appeal by obtaining special leave of Supreme Court in any case other than the above under Article 136 from any judgment, decree, determination, sentence or order in any cause, or matter passed or made by any court or tribunal.

Articles 132 and 133—Scope of.

If the subject-matter of appeal involves a substantial question of law as to the interpretation of the Constitution then an appeal shall lie to the Supreme Court either on the certificate of the High Court or by special leave of the Supreme Court in case where the High Court refuses a certificate. In effect the validity of an Act or any interpretation of the Constitution can be examined by the High Court subject to the final view of the Supreme Court in all such matters, as the supreme authority. Irrespective of the nature of the proceedings in which such constitutional questions arise the widest amplitude is given for resolving such questions in the special forum of the High Court and the Supreme Court[4]. The scope for appeal under Art. 132 is restricted to constitutional questions arising upon the findings of either the High Court or the Subordinate Court[5]. The word 'substantial' in the Article refers to cases where there is a difference of opinion[6] and not where the matter is covered by the previous decision of the Supreme Court[7]. Thus under the category of substantial questions of law relating to the interpretation of the Constitution, came a suit challenging a statute as *ultra vires*[8], cases directly involving the interpretation of particular provisions of the Constitution[9], where a law[10] or an executive order[11] or a custom[12] offends a fundamental right.

In cases where an appeal is filed on the strength of a certificate of a High Court under Art. 132 (1), the grounds of appeal must be restricted to those

4. *Election Commission* v. *Venkata*, A.I.R. 1953 S. C. 210.
5. *Sudhir* v. *The King*, (1948) D.L.R. (F.C.) 4.
6. *Jang Bahadur* v. *Principal*, A.I.R. 1951 Pepsu 61.
7. *Toomu* v. *Civil Administrator*, A.I.R. 1954 Hyd. 126 See, *Krishnaswamy* v. *Governor-General*, A.I.R. 1947 F.C. 37.
8. *Bhairabendra* v. *State of Assam*, (1956) S.C.A. 736.
9. *Sri Hari Vishnu* v. *Ahmed*, A.I.R. 1955 S.C. 233.
10. *Ganapati* v. *State of Bihar*, A.I.R. 1955 S.C. 188, *Budhan* v. *State of Bihar* A.I.R. 1955 S.C. 191.
11. *Namazi* v. *Dy. Custodian*, (1951) 2 M.L.J. 1.
12. *Ram Bhan* v. *Raj Bhan*, A.I.R. 1951. V.P. 38.

in respect of which the certificate had been granted. If other grounds have to be traversed, special and further leave of the Supreme Court under Art. 132 (3)[13] is necessary.

The Explanation to Art. 132 denotes that the words 'final order' includes an order deciding an issue which if decided in favour of the appellant would be sufficient for the final disposal of the case. In *Kuppusamy* v. *The King*[14] an order rejecting an objection as to the validity of a prosecution for want of sanction was held to be not a final order. To cover such cases alone the 'Explanation' to Art. 132 has been introduced. Under Art. 132 such an order for the purposes of an appeal would be a final order, if a constitutional question was involved. An order deciding an issue which if decided in favour of the appellant would be sufficient for the final disposal of the case, is a final order within the meaning of Art. 132.

An objection as to the maintainability of a prosecution if upheld will be a final order as it leads to the acquittal of the accused, finally disposing of the case. It is a final order for purposes of Art. 132 though it may not be one for purposes of appeal under Art. 134. Where constitutional questions are involved an order remanding a suit for rehearing on the merits consequent on the decision on the preliminary issue as to the maintainability of the suit, is a final order under Art. 132 though not under Art. 133. Similarly, where the High Court disposes of a *mandamus* petition under Art. 226 not on merits pertaining to rights of parties, but prohibiting Government from interfering petitioner's possession for a certain period by which the petitioner will file a regular suit, the order is final under Art. 132 though not under Art. 133[15].

The essential elements of Art. 132 may be stated to be[16] :—

(1) the case must involve a question of law,

(2) it must be a substantial question of law,

(3) it must be a question of law and not of fact,

(4) it must be a question as to the interpretation of the Constitution and not of any other Law.

It may be noted that the primary factor is that the question should involve a substantial question of law as to interpretation of the Constitution. So, where the question about want of jurisdiction of the High Court to interfere under Art. 227 was not raised when the Rule was heard, and besides the Article had already been construed by the Supreme Court, it was held that there was no case for the certificate under Art. 132 (1)[17]. Where the question of interpretation of the Constitution taken up in petition under Art. 226, was not pressed at the time of the hearing of that application but was raised by way of argument at the time of petition for granting leave to appeal and the question was concluded by authority of the Supreme Court, it was held that leave to appeal could not be granted[18].

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13. *State* v. *Muktar Singh*, A.I.R. 1957 All. 505, See, *Darshan Singh* v. *State of Punjab*, A.I.R. 1953 S.C. 183.
14. (1947) F.G.R. 180.
15. *State of Orissa* v. *Madan Gopal* 1952 S.C.R. 28.
16. See *State of Manipur*, v. *Sarangthem* A.I.R. 1957 Manipur 7.
17. *Nibaran Chandra Baz* v. *Mahendra Nath*, A.I.R. 1959 Cal. 679.
18. *Chintamani Pratihari* v. *State of Orissa*, A.I.R. 1958 Or 18.

Where the High Court set aside the order of dismissal of a public servant on the ground that no opportunity was given as contemplated under Art. 311 (2), Art. 132 (3) cannot be invoked for special leave since no substantial question regarding interpretation of Art. 311 existed and there were no good or compelling reasons for expressing dissent from the view of the High Court[19].

Where the appeals have come up before Supreme Court on the strength of a certificate granted under Art. 132 (1), the appellants are not entitled to challenge the propriety of the decision appealed against on a ground other than on which the certificate was given except with the leave of the Supreme Court under Art. 132 (3).

Scope of Article 133.

The Supreme Court in the exercise of its jurisdiction under Article 133 will not interfere with findings of fact unless it is a case of 'no evidence'[20]. If it is an appeal from the proceedings of the High Court under Art. 226[21] or Art. 227[22] this reluctance to interfere with the finding on questions of fact arrived at by a Tribunal, does markedly increase. Concurrent findings of fact are not generally interfered with[23]. But they may be interfered with where there has been a sustantial failure of justice, say where the finding is unsupported by any evidence on the record[24]; or where the finding of fact turns upon questions of law, *e.g.*, construction of documents or admissibility of material evidence[25]; or where it is a mixed question of law and fact; or it is a case of unusual nature necessitating interference[26-27]; such as where there has been a miscarriage of justice or the violation of some principles of law of procedure[28].

A substantial question of law is required for the purpose of the certificate. It must be so substantial that there may be some doubt or difference of opinion with respect to the question of law involved[29]. There must at least be room for difference of opinion[30].

A certificate granted under Art. 133 does not preclude the Supreme Court from entertaining an objection that no appeal lies under that Article[31]. Under Art. 136 the Supreme Court may even in cases where the certificate is defective entertain an appeal by special leave. For this there must be exceptional grounds[32]. It is open to the appellant to support the certificate on grounds other than on which it was granted for inviting special leave of the Supreme Court[33]. It is left to the Supreme Court to decide on the matters that can be raised in appeal, irrespective of the certificate[34].

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19. *State of Mysore* v. *H. L. Chablani*, A.I.R. 1958 S.C. 325.
20. *D. C. Works* v. *State of Saurashtra*, A.I.R. 1957 S.C. 264.
21-22. *Ibid.*
23. *Trojen & Co.* v. *Nagappa*, A.I.R. 1953 S.C. 298.
24. *Ibid.* Also *Harendra* v. *Haridasi*, (1914) 41 Cal. 972 (P.C.)
25. *Venkateswara* v. *Shekari*, (1881) 3 Mad. 384 P.C.; *Tilakdhari* v. *Kesho*, A.I.R. 1925 P.C. 122.
26. *Iswar Gopal* v. *Pratapmal*, A.I.R. 1951 S.C. 214.
27. *Bibabhati* v. *Ramendra*, (1946) 51 C.W.N. 98 (P.C.); *Srinivas* v. *Mahabir*, 1951 S.C.J. 261.
28. *Rani* v. *Khagendra*, (1904) 31 Cal. 871 (P.C.).
29. *Gulabchand* v. *Kudilal*, A.I.R. 1952 M.B. 149.
30. *Subharao* v. *Veeraraju*, A.I.R. 1951 Mad. 969.
31. *State of Madras* v. *C. P. Agencies*, A.I.R. 1955 Nag. 287.
32. *Ramasami* v. *Official Receiver*, A.I.R. 1951 Mad. 1051.
33. *Moolji* v. *Khandesh Spinning Mills*, 1950 S.C.J. 51.
34. *Dy. Commr., Hardol* v. *Ramakrishna*, 1954 S.C.R. 506.

The High Court has the power to refuse the writ of *certiorari* if it is satisfied that there was no failure of justice and in appeals against such orders under Art. 226, the Supreme Court can refuse to interfere unless it is satisfied that the justice of the case requires it[35].

The Supreme Court can interfere on findings of fact if the conclusion of the High Court is based partly on a misreading of the evidence and partly on non-advertence to important material evidence bearing on the question and the probabilities of the case. In such an event the Supreme Court can examine the evidence[36].

In *Narsingh and another* v. *State of U.P.*[37] the Supreme Court held that both under Art. 134 (1) (c) and Art. 133 (1) (c) the mere grant of a certificate would not preclude the Supreme Court from determining whether it was rightly granted. The discretion of the High Court is a judicial discretion in the grant of a certificate on well-established lines. The certificate must show on the face of it that the discretion conferred was invoked and properly exercised.

Article 136—Special Leave Appeals.

Article 136 is the final safety valve of Justice by which the citizen can obtain final redress at the hands of the Supreme Court, in any matter in dispute between Party and Party, or Party and State. Though the power is discretionary, the Supreme Court has set for itself certain standards which betoken real redress. The power is purposefully left discretionary so that litigation may not become an end in itself. It should be only a means for justice and should never be abused by professional litigants and unscrupulous clients.

Under Article 136, an appeal can only be by special leave obtained from the Supreme Court. Such leave to appeal can be from :

(a) any judgment, decree, determination, sentence or order.

(b) in *any cause* or matter,

(c) passed or made by *any* court or *tribunal* in the territory.

This power of special leave is not subjected to any constitutional limitation and is left discretionary to the Supreme Court[38] more particularly to give relief in cases where principles of natural justice are violated and the aggrieved party is handicapped by having no redress by way of appeal as of right. Such denial of the right to appeal appears often in the case of specially constituted tribunals. Special leave to appeal extends to decisions of any court or tribunal save military tribunals.

Where the proceeding is neither civil or criminal, resort to Arts. 133-134 is closed. In such matters and where no question of constitutional interpretation arises (in which event Art. 132 can be invoked), the only remedy to the aggrieved party is by resort to Art. 136.

In the interests of justice the Supreme Court may interfere under Art. 136 in respect of *any court* (not necessarily the High Court) and of any *tribunal* within the territory of India.

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35. *Alison* v. *B. L. Sen*, A.I.R. 1957 S.C. 227 (Decision under S. 20, Minimum Wages Act).
36. *Moran Mar, B. Catholicos* v. *Panlo Avira*, A.I.R. 1958 S.C. 31.
37. (1955) I. S. C. R. 238 : 1954 S.C.J. 570.
38. *Bharat Bank* v. *Employees of Bharat Bank*, A.I.R. 1950 S.C. 188.

In *Pritam Singh* v. *The State*[39] the Supreme Court while dealing in a criminal matter refused to interfere with concurrent findings of fact and laid down the following principles. Special leave can arise only in exceptional and special circumstances where substantial and grave injustice has been caused. The interference of the Supreme Court can be in respect of any court or tribunal in India, in any cause or other matter where special circumstances are clearly shown to merit such interference. Though the Supreme Court is not bound to follow too rigidly the decisions of the Privy Council yet the principles laid down by the latter will be considered in the matter of granting special leave. Interference in criminal cases can only arise where substantial injustice has been caused. In no event will the Supreme Court constitute itself into a third court and reweigh the evidence. Once special leave is granted the entire case is not at large. The appellant is not free to contest all findings of fact and raise every point which ought to have been raised in the High Court or the trial court. He can urge only those points which are fit to be urged at the *preliminary stage* when leave to appeal is asked for. It would certainly be illogical to adopt two different standards at two different stages of the same case.

In *Bharat Bank, Ltd.* v. *Employees of the Bharat Bank, Ltd.*[40], Kania, C.J., stated. "Even though the Supreme Court has jurisdiction to grant leave to appeal from a decision given by an industrial tribunal, yet having regard to the nature of the functions of the Industrial Tribunal the Supreme Court will be very reluctant to entertain an application for leave to appeal". Mahajan, J., added. "The Supreme Court is not to substitute its decision for the determination of the Industrial Tribunal when granting relief under Art. 136. When it chooses to interfere in the exercise of these extraordinary powers, it does so because the tribunal had either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the well-established rules of natural justice; in other words, it has denied a hearing to a party or has refused to record his evidence or has acted in any other manner in an arbitrary or despotic fashion. In such circumstances, no question arises of this court constituting itself into a tribunal and assuming powers of settling a dispute. All that the court when it entertains an appeal would do is to quash the award and direct the tribunal to proceed within the powers conferred on it and approach the adjudication of the dispute according to principles of natural justice. This court under Art. 136 would not constitute itself into a mere court of error. Extraordinary powers have to be exercised in rare and exceptional cases and on well known principles."

The majority opinion in the instant case delivered by Kania, C.J., (Patanjali Sastri and Mukherjea, J.J., Contra.) was clearly of the view that the industrial tribunal set up under Sec. 7 of the Industrial Disputes Act, 1947, had all the necessary attributes of a court of justice. The words 'determination, cause or matter and tribunal' greatly widen the scope of Art. 136. But the Supreme Court will not interfere when the determination of the tribunal has not been materially affected by an alleged wrong interpretation of any word, where the tribunal has come to an allegedly wrong decision with full jurisdiction to come to that decision or where the award of the tribunal is based on no evidence when this ground was not urged in the application for special leave.

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39. A.I.R. 1950 S.C. 169 : 1950 S.C.R. 453.

40. A.I.R. 1950 S.C. 188 : 1950 S.C.R. 459.

In *Janardhan Reddy* v. *The State*[41] the Supreme Court has decided that Art. 136 cannot be applied retrospectively. The Supreme Court will not assume a jurisdiction which is not warranted by the Provisions of the Constitution nor offer to provide a relief which has been omitted in the Constitution, for that will be tantamount to making legislation which is never the function of the court[41].

In *Dhakeswari Cotton Mills* v. *Commissioner of Income Tax*[42] the Supreme Court took occasion to point out that there is an overriding and exceptional power vested in them to be exercised only in special and extraordinary situations. It is not possible to define with any precision the limitation of these powers. The existence of an alternative statutory remedy or the finality given to the decision of the inferior court or tribunal by any statutory provision cannot deter the Supreme Court from exercising its power under Art. 136. In the instant case[42] in the interests of natural justice the Supreme Court set aside the decision of the Tribunal in an Income Tax assessment matter since the decision of the Tribunal rested on a certain information which was not disclosed to the assessee for rebuttal.

In *Muir Mills* v. *Suti Mills Mazdoor Union*[43] it has been held that Industrial Tribunals are Tribunals within the meaning of Art. 136 and that Article has vested on the Supreme Court exceptional and overriding power to interfere where it reaches the conclusion that a person has been dealt with arbitrarily or that a court or Tribunal within the territory of India has not given a fair deal to a litigant.

It is not possible to define the discretionary jurisdiction under Art. 136[44]. The limitations whatever they be are implicit in the nature and character of the power itself. It should be used sparingly and with caution. All that can be said is that the Constitution having trusted the wisdon and good sense of the judges of the Supreme Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice[44]. No technical hurdles or finality provisions in certain statutes can stand in the way of relief being given under Art. 136[44].

In special appeal against the decision of an Election Tribunal the Supreme Court will not interfere with conclusions of fact as in an appeal. It has only to see whether a Tribunal of reasonable and unbiased men could judicially reach such a conclusion[45]. Under the law the decision of the Tribunal is final unless there is some glaring error which has resulted in a substantial miscarriage of justice[45]. Where there is no flagrant error of law or procedure nor was there any miscarriage of justice in findings on fact interference under Art. 136 is not called for[46].

In *Durga Shankar Mehta* v. *Raghuraj Singh*[47] it has been posited that the right of seeking election and sitting in Parliament or in a State legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing the right, no other remedy by ordinary action in a court

41. A.I.R. 1951 S.C. 253 : 1951 S.C.R. 474.
42. (1955) 1. S.C. R. 941.
43. A.I.R. 1955 S.C. 170.
44. *D. C. Mills, Ltd.* v. *Commr. of L. T. W. B.*, A.I.R. 1955 S.C. 65.
45. *Jamuna Prasad Mukhariya* v. *Lachhi Ram*, A.I.R. 1954 S.C. 686.
46. *A. J. Perrias* v. *State of Madras* A.I.R. 1954 S.C. 616.
47. A.I.R. 1954 S.C. 520. See also *Raj Krishna Bose* v. *Binod Kanungo*.

of law is available to a person in regard to election disputes. The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election the overriding power of the Supreme Court to grant special leave in proper cases would certainly be attracted and this power cannot be excluded by any Parliamentary legislation. The '*non obstante*' clause in Art. 329 cannot take away the jurisdiction of the Supreme Court after a Tribunal is seized of an election petition. The prohibition of resort to any other court is to restrict election disputes being adjudicated only by Election Tribunal on a properly framed election petition. But after this stage, the Tribunal's verdict is certainly amenable to the jurisdiction of the High Court under Art. 226 and of the Supreme Court under Art. 136.

The overriding powers, which have been vested in the Supreme Court under Art. 136, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council in England. In the first place Art. 136 is a consolidated provision which unlike the prerogative right of the Crown, no Parliamentary legislation can limit or take away[47]. In the second place the provision being one which overrides ordinary laws, no presumption can arise from words and expressions declaring an adjudication of a particular tribunal to be final and conclusive that there was an intention to exclude the exercise of the special powers.

Where the question of jurisdiction is not a pure question of law but it is mingled with facts, a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of the Appellate Tribunal[48].

In *Province of Bombay* v. *Khushaldoss*[49] it was posited that when an executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of *certiorari*. When the law under which the authority is making a decision, itself requires a judicial approach, decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial provided in coming to the decision the well-recognised principle of approach are required to be followed. Therefore, whenever any body of persons having legal authority to determine questions affecting rights of subjects and having the duty to act judicially act in excess of their legal authority, a writ of *certiorari* may issue[49].

Interference on questions of fact.

Ordinarily, the Supreme Court will not, in special appeal under Art. 136, review findings of fact recorded by an Election Tribunal if there is evidence on which they could be reached[50]. The High Courts and the Supreme Court alone (under Art. 226 and Art. 136 respectively) can determine what the law of the land is vis-a-vis all other courts and tribunals. All that the inferior tribunal can do is to reach a tentative conclusion which is subject to review

48. *U. P. Bank* v. *Secy., U. P. Bank Employees' Union*, A.I.R. 1953. S.C. 437.
49. A.I.R. 1950. S.C. 222: 1950 S.C.R. 621.
50. *T. Nagappa* v. *T. C. Basappa*, A.I.R. 1955. S.C. 756.

under Art. 226 and Art. 136[51]. In the instant case such review was held available despite Sec. 105, Representation of People Act. But this does not mean the review will be as by a court of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense. It is not the practice of the Supreme Court in special leave cases and in exercise of its overriding powers to interfere with a matter which rests in the discretion of the High Court except in very exceptional cases[52]. There will be no interference with the findings of fact under Art. 136, unless something substantial is shown to persuade the Supreme Court to do so[53]. When both the Tribunal and the High Court have made concurrent findings of fact against the appellant that he was guilty of professional misconduct, the Supreme Court refused to re-examine the matter on merits[54]. But where a tribunal has spoken in two voices, and has given inconsistent and conflicting findings, the Supreme Court may have to determine which of its findings should be accepted as supported by materials[55]. When the finding is not supported by any legal evidence and is wholly inconsistent with the materials produced on the record the Supreme Court may go into the evidence and set aside the findings[56]. The appellant, however, cannot ask the Supreme Court in a special leave appeal to reassess the evidence and to come to a conclusion of its own on it[57]. Where the view taken by the tribunal was a reasonably possible view on the evidence adduced and where it could not be said that that view was not supported by the evidence or was unreasonable, no interference under Art. 136 is called for[57]. The Supreme Court does not sit as a regular court of appeal over Industrial Tribunals and does not ordinarily subject the evidence given on behalf of the parties to a fresh review and scrutiny, unless it is shown that exceptional and grave injustice has been done or that the case in question presents features of sufficient gravity to warrant a review of the decision appealed from[58]. If in giving the findings the courts ignore certain important pieces of evidence and other pieces of evidences, which are equally important are shown to have been misread and misconstrued and the Supreme Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference of the Supreme Court will be called for[59].

The Supreme Court usually hesitates to reverse administrative determinations particularly on questions of fact. The normal practice is not to interfere with findings of fact of the tribunal unless it was a case of no evidence[60]. In *Rohtas Industries, Ltd.* v. *Brijnandan Pandey and others*[61] the court had no hesitation in shifting the facts on record to prevent the object of the statute

51. *Sanghram Singh* v. *Election Tribunal,* A.I.R. 1955 S.C. 425. See *Surendra Nath Khosla* v. *S. Dalip Singh,* A.I.R. 1957 S.C. 242.
52. *M. Y. Shariff* v. *Hon'ble Judges of The Nagpur High Court,* A.I.R. 1955 S.C. 19: 1955 S.C. R. 757.
53. *Khacheru Singh* v. *State of U. P.* A.I.R. 1956 *S. C.* 546. See *Chikkarange Gowda* v. *State of Mysore,* A.I.R. A.I.R. 1956 S.C. 731.
54. *Manaklal, Advocate* v. *Dr. Premchand Singh,* A.I.R. 1957 S.C. 425.
55. *Pipraich Sugar Mills, Ltd* v. *P. S. Mills Mazdoor Union,* A.I.R. 1957 S.C. 95.
56. *D. Macropollo & Co. (Private) Ltd.* v. *D. M. & Co., Ltd. Employees' Union,* A.I.R. 1958 S.C. 1012.
57. *Sevachand Boid* v. *Commr. of Income Tax,* A.I.R., 1959. S.C. 59.
58. *Messrs. Indian Iron & Steel Co., Ltd.* v. *Their Workmen,* A.I.R. 1958 S.C. 130.
59. *Ernest John White* v. *Mrs. Kathleen Oliver White,* A.I.R. 1958 S.C. 441.
60. See *Basappa* v. *Nagappa and others,* A.I.R. 1955 S.C. 756.
61. A.I.R. (1957) S.C. 1.

from being frustrated by a misconstruction or misreading of the evidence by the tribunal. In the instant case[61] since the tribunal had not made proper scrutiny into the evidence and since all the necessary data were before the court in order obviously, to avoid further delay of a *de novo* enquiry, the Supreme Court went into the evidence itself and gave permission to the appellant to discharge the workmen. In *Martin Burn, Ltd.* v. *R. N. Banerjee*[62] while considering the scope of Sec. 22 of the Industrial Disputes Act, the Supreme Court stated, "A *prima facie* case does not mean a case proved to the hilt but a case which can be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on the evidence .... it has only got to consider whether the view taken is a possible view on the evidence on the record".

The Supreme Court cannot substitute its own judgment on questions of fact where the tribunal has come to a possible view on the evidence. 'The substantial evidence rule' which obtains in America[63] has no place in India. In America Sec. 10 (e) (5) of the American Administrative Procedure Act, 1946, incorporates the rule of substantial evidence on the whole record as a criterion for judicial review of administrative actions. In India interference on questions of fact is possible only in cases of no evidence or where there has been a misreading of evidence, findings having been given on irrelevant issues[64]. Where the court is inclined, it sees for what is termed 'legal evidence' for interference. Ordinarily, even if there is some evidence a finding is not disturbed. Interference is permitted when findings are perverse or are based on no evidence[64]. If there is some evidence or any evidence the findings are not disturbed[65]. All that the court notes under Art. 136 is whether a tribunal of reasonable and unbiased men could judicially reach such a conclusion. The court will not enter in such cases as to the soundness of the findings[66]. But where the finding is arbitrary or arrived at in violation of the principles of natural justice[67], or where the tribunal had spoken in two voices and had given inconsistent and conflicting findings[68] interference is possible under Art. 136.

Special considerations under Art. 136.

In appropriate cases a fresh point if it be purely one of law can be argued for the first time before the Supreme Court, though it was not convassed before the lower court or tribunal[69]. In a special appeal against an order of a High Court which was moved for the exercise of its power of superintendence under Art. 227, it is open to the Supreme Court to exercise the same power[70].

It may be noted that it is not the practice of the Supreme Court to give reasons for the dismissal of an application for special leave[71]. In a Review

62. A.I.R. 1958 S.C. 79.
63. See *Consolidated Edison Co.* v. *N. L. R. B.* 305 U. S. 197, 229 (1938).
64. *Dinabandu* v. *Jadumani,* A.I.R. 1954 S.C. 411.
65. *Nagappa* v. *Basappa,* A.I.R. 1955 S.C. 756; *Khader* v. *Mannuswami,* (1955) 2 S.C.R. 469.
66. *Jamuna Prasad* v. *Lachhi Ram,* A.I.R. 1954 S.C. 686.
67. *Dakheswari Cotton Mills* v. *Commr. of I. T.,* (1955) 1. S.C.R. 941.
68. *P. S. Mills* v. *Mazdoor Union,* A.I.R. 1957 S.C. 95.
69. *State of Bihar* v. *Ram Naresh Pandey,* A.I.R. 1957 S.C. 389: 1957 S.C.R. 336.
70. *Baldeo Singh* v. *State of Bihar,* A.I.R. 1957 S.C. 612.
71. *Associated Tubewells Ltd.* v. *Gujarmal Modi,* A.I.R. 1957 S.C. I. 742.

application (Art. 137) of a dismissal order under Art. 136, it was held highly improper on the part of an advocate to refer in detail as to what, according to him, happened in court on the prior occasion and what each judge said in the course of the argument followed by a confident assertion how and why the application was dismissed[71].

In the matter of condonation of delay in filing the appeal the Supreme Court can exercise its discretion under Art. 136. Where a party acquiesces in a judgment and deliberately allows the time for filing an appeal to lapse it would not be a sufficient ground to condone the delay that he has subsequently changed his mind and desires to prefer an appeal[72]. But where the result of the litigation would affect the rights of members of the public, and it is just that the matter should be decided on the merits, so that the controversies involved might be finally settled, the delay will be condoned[72].

Finality clauses in statutes cannot affect the jurisdiction of the Supreme Court under Art. 136. Thus the provision in Sec. 46, Railways Act, about the finality of the Railway Rates Tribunal cannot affect the special jurisdiction of the Court under Art. 136.[73].

The right to apply for leave to appeal under Art. 136, if it could be called a 'right' at all, cannot be equated to a right to appeal. Obviously, a High Court cannot refuse to entertain an application under Art. 226 on the ground that the aggrieved party could move the Supreme Court under Art. 136. That the latter court declined to exercise its discretion in favour of the petitioner by granting the leave asked for, cannot affect the jurisdiction vested in the High Court under Art. 226[74]. Even had there been a right of appeal to any other forum whether it was availed of or not, the jurisdiction under Art. 226 would be left untouched. However, the fact that the Supreme Court declined to exercise its discretion in favour of the petitioner and refused to grant leave under Art. 136 against the award of the Industrial Tribunal without giving any reasons (as is the practice of the Supreme Court), is a factor that ought to be taken into account and given due weight, when the High Court is called upon to exercise its discretion in favour of interference with the award of the tribunal on some of the very grounds specified in the application for leave to appeal that failed[74].

Power to Parliament to modify the rights conferred by this part in their application to forces

Article 33.—Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of Public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

FOREIGN CONSTITUTIONS

Burma.

Art. 28 of the Burmese Constitution is on the same lines as Art. 33 of India.

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72. *Sri Venkatramana Devaru* v. *State of Mysore*, A.I.R. 1958 S.C. 255.
73. *Raigarh Jute Mills Ltd.* v. *Eastern Railway* A.I.R. 1958 S.C. 525.
74. *Management of Western India Match Co. Ltd.* v. *Industrial Tribunal Madras*, A.I.R. 1958 Mad. 398.

Eire.

Art. 38 (4) and (6) of the 1937 Constitution of Eire postulates:

"(4). 1. Military Tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

"2. A member of the defence forces not on active service shall not be tried by any court martial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any court martial or other military tribunal under any law for the enforcement of Military discipline.

"6. The provisions of Arts. 34 and 35 of the Constitution shall not apply to any court or tribunal set up under Sec. (3) or Section (4) of this article."

COMMENTS

England.

The Army is subject to the code of special Law and this is outlined in the Army Act 1881, the Kings Regulations and Army Orders. Military Offences scheduled out in these laws are tried in court-martial. The soldier has however two liabilities : one to be subject to the disciplinary rules and laws of the army and the other to be subordinate to the civil laws which enjoins on him also certain duties and liabilities of the ordinary citizen. The code of civil and criminal law of the country is as much binding on the soldier once he transgresses their provisions. It is no defence to a criminal change under the penal law of the land for a soldier to bank on his superior's orders of the latter was not based on a reasonable and good ground.[1] In respect of what are called military offences, which flow out from the Army Act 1881, Kings Regulations and Army Order there is a 'Court Martial' provided to try those offences. Generally, these offences not only include offences committed by one soldier against another but also some of the offences which are ordinary crimes. For the latter, wherever it is covered by the ordinary law of the land, a soldier may also be tried in the ordinary court of the land. But in respect of military offences, the jurisdiction of court martial is exclusive. The object of the "Mutiny Act" was to create a court with authority to try those who are a part of the army, in all these different descriptions of officers and soldiers and the object of the trial is limited to breach of military duty."[2] The deprivation of the normal rights of a citizen when he joins the military and the special code of military laws of discipline enjoined on him, is the inevitable development of a political organization which must needs enforce a special military discipline in the very interest of safeguarding the society and the country for which purpose alone the militia of a country is created. There can be a provision in the Military Code prohibiting a soldier "from resorting to Civil Tribunals of the country for redress of a wrong inflicted under colour of military authority."[3]

But it is Parliament of England that has to give all sanction for all Laws. So in *Warden* v. *Bailey*[4] the military order that was challenged had been issued by a Colonel that Seargents and Corporals should attend an evening school for enabling them to read and write and that all the men were to pay the Seargent Major, the School Master, 9d. per week as tuition fees and other

1. *Knighty* v. *Bell* (1866) 4 F & F. 763.
2. Vide *Grant* v. *Sir Charless Gould.* (1792) 126 E.R. 434-2 H. Bl. 39.
3. *Dawkins* v. *Panlet* (1869) 5 Q. B. (109-110)-39 L. J. Q. B. 53.
4. (1811) 128 E. R. 253-4 Taunt 67.

expenses. Imprisonment was levied for any disobedience. Mansfield C.J. held "We think that the order to attend School most probably was bad, and an excess of authority but the order of taxation was certainly so . . . . the subject cannot be taxed even in the most indirect way unless it originates in the Lower House of Parliament."

It may be mentioned that no action could lie against a military personnel for acts done in the ordinary course of his normal duties as a military officer. It would not matter even if such act was done without reasonable or probable cause and with malice[5]. Military rules are special and peculiar to the special calling. Disobedience to military superiors is an offence under military law though not under the ordinary law. An officer's conduct may not amount to a crime under the ordinary law but if it is 'unbecoming to an officer and a gentleman' he may be punished under the military law. But if a person in military service is charged with an offence against a subject of the Crown which may be an offence both at common law and in Military law, he must be tried in a non-martial, civil court. A case tried by a military court can be retried in a civil court but not vice versa. If there is a conflict between civil and military law the former must prevail.

Soldiers are answerable to the ordinary courts for ordinary Penal Offences. He can be sued for debts and liabilities in a civil court. Whether a man is subject to civil or military law is for the civil court to decide. The latter can also decide for damages for assault, false imprisonment, or other actionable wrong, committed by a military officer acting without jurisdiction or in excess of military discipline.[6] But if the injury is done within the limits of military jurisdiction military courts alone have to decide the same.[5] Sometimes the soldiers will get into a dilemma. Obedience to his superior's orders may result in breaches of the law of the land. Dicey[7] put it pithilly, "He may be liable to be shot by a court martial if he disobeys an order and to be hanged by a judge and jury if he obeys it". Hence his true duty is, to obey the law of the land even at the risk of disobeying his superior and that will be a proper answer to a charge under the Military Law.[8]

But where a soldier honestly behaves that his superior's order was legal and it turns out to be contra he would be protected.[9] The Crown also, in suitable cases, can exercise its prerogative of pardon or the Attorney-General can enter a Nolle Prosequi (i.e. unwilling to prosecute). But if the military order was illegal and unreasonable and the soldier could have easily known it, he is not protected at all.

Martial Law is different from the law applicable to the Army. Martial Law is promulgated in times of emergencies when there is great internal disorder in a country. Such a declaration suspends the operation of all ordinary laws and ordinary courts, extends arbitrary powers to the executive and nullifies all that the constitution stands for, Holsburg said 'Martial Law is no Law'. All bona fide acts of the Military done in the service of the country during such martial law period is protected by an indemnity even if they are unlawful. The Defence of Realm Acts extend in such conditions imprisonment without trial, suspension of Habeas Corpus etc.

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5. *Dankins* v. *Panlet* (1869) Q.B. 91-39 L. J. (QB) 53.
6. *Heddon* v. *Evans* (1919) 35 TLR 642.
7. Dicey Law of the Constitution, p. 299.
8. *Knighty* v. *Bell* (1886) 4 F & F at 790.
9. *Reg* v. *Smith* (1900) 17 Cape of Good Hope Supreme Court Reports 561.

Action for liability for damages by a military officer for wrongly bringing the plaintiff his subordinate before a court martial was negatived in *Jhonstone* v. *Sutton*.[10]

America.

The Law in America follows closely the English Pattern. Members of the Military when they are within U.S.A. territory are answerable to the Military law as well as the ordinary criminal law of the country for any transgressions. Ordinarily, the military should hand over the offending personnel to the jurisdiction of the civil authorities. The exception to this rule occurs when there is a State of War, or the accused is awaiting a trial by court martial or is undergoing a sentence passed by the latter tribunal.[11] If the Military Personnel is in enemy territory outside U.S.A. they are subject only to the jurisdiction of Military tribunals.[12] There is no provision in Article III of the U.S.A. Constitution indicating that Court Martial is part of the judicial system of the United States. Hence the rules of indictment and jury trial available in all criminal cases,[13] do not control court martial though the latter's jurisdiction to try is subject to enquiry by courts.

Nevertheless, in America Military Law is considered as Due Process of Law so far as the Military or Naval Services are concerned.[14] Hence it was held in *Reaves* v. *Ainsworth*,[14] that no error or injustice done in Military Proceedings can be corrected by resort to writs of *certiorari*.

Under the constitution the Federal Government in America has been given the full power for the organization and maintenance of both the naval and land forces of its own besides considerable authority over the State Militia Forces. Power also is given to "declare war, grant letters of marque and reprisal and make rules concerning captures on land and water" and 'to define and punish piracies and felonies committed on the High Seas and offences against the law of Nations.' It is further provided that the Congress shall have power to provide and make rules for the Government and regulation of the land and naval forces. Enrolment in the military entails new obligations under the military law but the soldier does not lose the right to the protection of the civil and criminal law nor is he released from the obligations thereunder. If he pleads the command of his military superior as defence, then the order of the latter must have been one which was within the competence of the officer. Except where the soldier has grounds for knowing that the act ordered to be committed was not a proper one and not within the official power of his superior, the soldier can escape liability for acts done under his superior's commands.[15]

The superior officer whose orders bring about any untoward results, not warranted by the law of the land is subject to the civil and criminal law of the land triable by the ordinary courts. In times of peace a member of the Military is subject to the civil and criminal law of each of the State. But Federal Military Officials and Privates cannot on that account be unduly or reasonably prevented from their normal military services to the Federal Union

10. (1786) 99 E. R. 1225. See also *Warden* v. *Baibey* (1811) 128 E. R. 253.
11. *Kahn* v. *Anderson* (1921) 255 U. S. I. (9).
12. *Coleman* v. *Tennessee* (1878) 97 U. S. 509.
13. *Dynes* v. *Hooler* (1857) 20 How. 65.
14. *Reaves* v. *Ainsworth* (1911) 55 Law Edn. 225-219 U. S. 296.
15. See Willoughly p. 643 (Student Edition).

in which event the Federal Government has power to interfere. Thus a Federal Court, in a *habeas corpus* proceeding can determine whether the act charged against the defendant as a violation of the criminal law of the State, was authorized and justified by Federal Law.[16] But this right of the Federal Court has to be exercised with great discretion.[17]

As already stated Courts Martial are not part of the judicial organization of the United States. The fifth amendment says:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia when in actual service in time of war or public danger." Hence there is no constitutional necessity for a jury trial in courts martial. The decision of courts martial while acting within their jurisdiction both as regards the parties and the subject-matter is not open to review in the civil courts. But if they possessed no such jurisdiction then the whole proceedings become null and void, and it will be competent for the civil courts to consider all acts committed by them as 'trespass for which punishment and dangers can be awarded to be duly executed by the executive officers'.[17] It may be that there are violations of both the Federal Military Law and the State Civil Law. The satisfaction entered for the former is no atonement for the latter.[19] This conflict between the military and civil powers is resolved by the Congress by giving precedence in such cases to civil courts.

In times of war particularly upon the actual theatre of war, military courts have without any special legislative sanction, exclusive jurisdiction over the member of the Military forces. An acquittal in a civil court may be pleaded as a bar to a later court martial proceeding and vice versa.[20] But the qualification is that it should be of the 'same governments' and hence this doctrine is inapplicable as between trials in State courts and court martial of the Federal Union. Military tribunals have jurisdiction also on civilians who interfere, meddle or endanger military operations[21]. The Congress has powers to subject enemy aliens to trial by the Military tribunal[22], since in the words of Marshall, J., "War gives to the Sovereign full right to take the person and confiscate the property of the enemy wherever found"[22]. In the matter of conduct of Foreign Relations of the United States, the States of the Union may not as such engage in a foreign War without Federal Authority. The Federal Union alone has such power. The component units cannot act independently and in the eyes of foreigners, U.S.A. acts as one component body[23].

Martial Law in U.S.A. includes:

1. Military Law of the Congress for the Government of the Army and Navy.

2. Principles touching the conduct of Military forces in times of war and in the Government of occupied territory.

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16. *United States* v. *Lipsell* (156) Fed. Rep. 567.
17. *Baker* v. *Grice* (169 U.S. 284).
18. *Dynes* v. *Hoover* (20 How. 65).
19. *Coleman* v. *Tennessee* 97 U. S. 509.
20. *Grappton* v. *United States* 206 U. S. 333.
21. *Exparte Milligan* 4 Wall 2.
22. *Brown* v. *United States* 8 Cr. 110.
22. *Grillert* v. *Minnesota* 254 U.S. 325.

3. Martial Law in sense strictiose i.e. where Civil Law is not superseded and the Military are merely called upon to aid in the execution of its civil functions.[24] Martial Law is essentially a branch of the police laws of the State, meant in the larger interests of the State and its security. For a valid Martial Law there must be some public advantage to be gained by the interference occasioned thereby to the personal liberty and property of an individual. But Martial Law does not abrogate Civil Law and Civil Guarantees. Unlike other written constitutions there is no declaration of emergencies needed for operation of martial law in U.S.A.

It is left to the executive to use military powers as well as civil powers as and when the occasion demands it. The use of Military arm (Martial Law) for the enforcement of civil law, is quite different from the establishment of Military Government over occupied territory in public war. Martial Law is used particularly in times of war as a public necessity and exercise of Military authority even outside the immediate theatre of war could be made permissible though in *Ex parte Milligan*[24] five out of nine Judges opined that the 'Necessity must be actual and present', and so if the area is outside the theatre of war, martial law is without jurisdiction. Opinion was divided on this issue as 'threatened Invasion' or 'proximity of the danger zone' was considered as no necessity for application of Martial Law. The liability of soldiers obeying unjustified commands of their superiors appears to be not protected.[25] Particularly when he has no reasonable grounds for believing that his superior was acting in excess of his legal authority or without justification for the command given by him.[26] But there is legislative authority to protect officials from prosecutions for acts illegally committed under colour of official authority.[27] *Habeas corpus* remedy is always available to the citizen but there can be suspension of this right in 'cases of rebellion or invasion' where the public safety requires it. (Art. 1 Sec. 9 Cl. 2). The President's power to suspend the writ is open to doubt and only the Congress has such power.[28] It must be remembered that except under 'Martial Law' a person not belonging to armed forces is not liable to be tried by a Military court or under Military law.[29]

India.

Art. 33 is an exception to the Fundamental Rights scheduled in Part III inasmuch as it allows restriction or abrogation by Parliament in relation to the members of the armed forces. This is to enable the fostering of discipline in them, so necessary for the special tasks allocated to them. Besides the armed forces, forces charged with the maintenance of public order (Police) also get the benefit of Art. 33 by Parliamentary sanction. The object is stated clearly in the article as 'so as to ensure the proper discharge of their duties and maintenance of discipline among them'. Art. 33 is an exception to the operation of Art. 13 Cl. (2) which prohibits any abridgement or revocation of the rights guaranteed in Part III of the Constitution.

The power of legislative sanction is confined to the Parliament of India. State Legislatures are not given any such power. The Legislative entry is

24. *Exparte Milligan* 4 Wall 2. See Willoughly p. 666.
25. See *Commonwealth of Pennylavina Ex. rel wads work* v. *Shortall* 206 Pa. 165.
26. Willoughly p. 675 (Student Edition).
27. *Tiaco* v. *Forbes* 228 U.S. 549.
28. *Exparte Boliman* 4 Cr. 75. See Storey's Commentaries Sec. 1336.
29. *Exparte Milligan* (1866) 18, Law Ed. 281, 4 Wal 2.

Schedule VII List I Entry 2 which gives exclusive power to Parliament in this regard. The State Legislative power in List 2 Entry 1 and 2 relate to Police and Public Order which is thus made exclusively a State matter. But Art. 33 is an exception to this power of the State as it extends competence to Parliament to legislate suspension or abrogation of Fundamental Rights with regard to Police Forces; also List 1 Entry 2 gives exclusive power to Parliament in respect to 'Naval, Military and Air Forces any other Armed Forces of the Union.'

Special Laws subjecting the men of the forces to a military court, excluding jurisdiction of civil courts, are based on the principle of political disciplinary necessity. Decisions of military courts are not to be questioned by civil courts and this is an accepted modern principle of jurisprudence.[30] But civil courts can question all orders which are outside the competence or jurisdiction of military courts. But in so far as matters that are within their jurisdiction, orders of military officers cannot be questioned by civil courts[31]. The Privy Council in Albert's case[31] upheld the judgment of Federal Court of India[32] and stated that no sanction of the Governor-General is necessary under Sec. 270 of the Government of India Act, 1935 for a prosecution of an officer of the Military before a court-martial for an offence alleged to be under the military code. It would be otherwise and sanction is necessary if an action is filed against the officer under the ordinary law of the land. It was further held that once it is a proceeding in court martial, the affected officer cannot claim the privileges available to him under the ordinary law.

Under Art. 33, civil courts continue to have the power to enquire if the Law impugned and the action taken by the superior military or police officer under cover of such a law is within the limits of powers conferred by legislation. They can further see if the abridgement of fundamental rights is occasioned by a valid law specifically restricting it and if such law was really for the purpose of ensuring the proper discharge of duties and maintenance of discipline as set out in Art. 33.[33]

The Indian Army Act VII of 1911 as amended by the Army Act (XLVI of 1954), the Indian Navy Discipline Act (XXXIV of 1934) and the Indian Air Force Act (XIV of 1932) are the statutes that govern the Army, Navy and Air Force. They have provisions for enforcing discipline, and trial of exclusively military offences by court martial. If it is an offence under the ordinary law then just as in England both the ordinary court as well as the court martial have jurisdiction to try them.

Restriction on rights conferred by this part while martial law is in force in any area.

Article 34.—Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

30. *Dynes* v. *Hoover* (1857) 15 Law Ed. 838.
31. *Albert West Meads* v. *The King* 1948 P. C. 156-75 Ind. App. 185.
32. *Meads v. Emperor* 1945 F. C. 21-I.L.R. (1945) Kar (F.C.) A.W.
33. Vide *Ram Singh* v. *State of Delhi* A.I.R. 1951 S.C. 270.

COMMENTARY.

OTHER CONSTITUTIONS

England.

Martial Law ordinarily means the suspension of ordinary law and ordinary courts and the assumption of arbitrary powers by the executive in times of war or insurrection. The Crown has undoubtedly power to declare war with a foreign country but the Crown has no prerogative to declare war on his own people. Martial Law need not be proclaimed[34]. It takes effect as soon as the emergency arises. Courts are free to enquire if martial law existed when force is used. But once the emergency for martial law is over, and recourse to ordinary courts is available, no punishment can be effected under Martial Law. Courts martial is the medium of settlement during Martial Law. Martial Law is called 'No Law'. The Duke of Wellington once put it " 'Martial Law' is neither more nor less than the will of the general who commands the Army, in fact no law at all." Hence Martial Law is invariably followed by an Act of Indemnity by Parliament which itself indicates that the common law rights of a subject cannot be ousted except by an Act of Parliament.

In England Martial Law in the sense of suspension of rights is unknown. Martial Law is compendiously included in the right of the Crown to use force against law-breakers or unsurrectionists and hence is it there is no need to proclaim Martial Law. If excessive force is used ordinary law of the land will yield the remedy. Dicey reasons it out thus under four heads : (1) Martial Law cannot exist in peace. (2) The existence of Martial Law does not in any way depend upon a proclamation of Martial Law. Its only effect is to give notice of the intention of the Government. (3) Courts have, at any rate in times of peace, jurisdiction in regard to acts which have been done by Military authorities and others during a state of War. (4) The proper protection of Military men and others against actions or prosecutions in respect of unlawful acts done during war time *bona fide* and in the service of the country is an Act of Indemnity.[35]

But Martial Law in the continental sense (in Europe) can be exercised by Royal prerogative even in times of peace unlike in England.[36] While it is different in the colonies and in Ireland,[36] in Great Britain the ordinary law is never taken to be suspended. Even during times of war in England the Crown has not exercised the prerogative to declare Martial Law, at any rate since the time of Charles I. During the Great War the Emergency Powers Act, 1940 was found sufficient to deal with the situation with new special war zone courts created under the Statute in case of an actual invasion. But there was no actual need for such courts as the ordinary courts met the gravest of situations. In England these ordinary courts cannot be suppressed except by act of Parliament. An act of Indemnity always followed to protect, whenever under Martial Law or otherwise, all unlawful acts committed bona fide in the interest of the country. Without such indemnity an action can lie in the ordinary courts after the cessation of hostilities[34] or the emergency. There is jurisdiction for the ordinary courts to determine if a state of war existed at the time when the impugned act took place.

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34. *Tilonho* v. *Attorney-General of Natal* 1907 App. cas. 93.
35. See Sahani's Constitutional Law of England p. 179.
36. Vide *Exparte Martin* (1902) A. C. 109.
37. *Higgins* v. *Wills* (1921) 21 r.R. 386.

There is a distinction between court martial and Military tribunal. The latter are not judicial bodies while the former is one created under the Military Law (vide Army Act of England—also India) i.e. times of peace or of war. Court martial is restricted to personnel subject to Military Law while a Military tribunal has jurisdiction even over ordinary citizens. Courts martial has a regular trial, its sentences are matters of record enforceable by Military authorities. But the judgments and sentences of Military tribunals have no legal force and hence it is that an act of Indemnity is later needed to protect those tribunals and their agencies. Now writ can lie against those bodies as they are not courts at all.[38]

The jurisdiction of court martial is limited by statute and any excessive assumption of powers can be prevented by resort to writs of *Habeas Corpus, Certiorari*[39] *Mandamus*[40] etc.

It may be noted that in the Indian Constitution court martial can be created under Art. 33 while a Military Tribunal can be set up under Art. 34.

Defence of the Realm Acts during the period of the War duly authorized by Parliament was found necessary as there was no war within the realm. These Acts gave special powers to the executive to deal with sudden crisis within the realm. The Act authorized imprisonment without trial of persons of hostile origin or association, and deprived them of even the right to *Habeas Corpus*.[41]

WHARTON'S LAW LEXICAN DEFINITIONS

In Wharton's Law Lexican Martial Law[42] is thus defined as meaning "Suspension of the ordinary Law and the Government of a country or part of it by Military tribunals. It must be clearly distinguished (1) from Military Law and (2) from that Martial Law which forms part of the laws and usages of the war. The term Martial Law is also sometimes used as meaning the common law right of the Crown to repel force by force in the case of insurrection, invasion or riot and to take such exceptional measures as may be necessary for the purpose of restoring peace and order".

"'Military Law' has been defined[43], as distinguished from 'Civil Law' as the law relating to and administered by Military courts and is concerned with the trial and punishment of officers, soldiers and other persons (*e.g.*, sutlers and camp followers) who are from circumstances subjected for the time being to the same law as soldiers. But the term 'Military Law' is frequently used in a wider sense and as including not only the disciplinary but also the administrative law of the army, as for instance the law of enlistment and billetting".

Indemnity Acts can nevertheless be questioned. Thus in *Phillips* v. *Eyre*[42] Cockburn J., stated, "There can be no doubt that every so-called Indemnity Act involves a manifest violation of Justice, inasmuch as it deprives those who have suffered wrongs of their vested rights to the redress which the law would otherwise afford them and gives immunity to those who have inflicted those wrongs not at the expense of the community for whose alleged advantage the wrongful acts were done but at the expense of individuals who innocent possibily of all

38. *In re* Clifford and O' Sullivan (1921) 2 App. cas 570.
39. Wolfe Tone's case (1798) 27 St. Tr. 614.
40. *Hedden* v. *Evans* (1919) 35 T.I.R. 642.
41. *Rex* v. *Halliday* (1917) A.C. 260.
42. (1869) 4 Q. B. 225.
43. *Wright* v. *Fitz Gerald* (1799) 27 State Tr. 759.

offence have been subjected to injury and outrage often of the most aggravated character ..... We may rest assured that no such enactment would receive the Royal assent unless the indemnity Act was confined to acts honestly done in the suppression of existing rebellion and under pressure of the most urgent necessity ".

Again Martial Law cannot be enforced wantonly and without due regard to human values and against principle of natural justice[43]. But acts done in good faith are protected even if there is no reasonable ground for such an action[44]. Ordinary court cannot issue a writ of prohibition to a military tribunal as the latter is not a court of law at all but a creature of Martial Law[45]. But after the emergency, unless an indemnity Act protects it, orders of such military tribunals will be illegal and can be questioned in civil courts.

Europe.

In continental countries, such as France, Martial Law connotes the suppression of the ordinary law and the substitution of Military Government. This is not so in England as we already adverted to. The Legislature declares the 'state of siege' on which Martial Law takes effect. If the Legislature is not in session the President can declare it but it should be subscquently ratified by thc Legislature. The Legislative Act prescribes the powers of the Military, duration of their authority, tribunals to be set up etc. Such a law ceases on the termination of the period fixed which the Legislature will see to that it synchronizes with the cessation of the emergency.

America.

Art. 4 (1) of the American Constitution extends a guarantee to every state of the Union of Republican form of Government and protects each of them against invasion. The Federal Government is bound on the application of the Legislature or of the Executive to protect the State from invasion or domestic violence (Clause 4 of Art. 4).

Art. 1 Sec. 8 (ii) states that the congress has power to declare war, grant letters of Marque and reprisal, make rules concerning captures on land and water, to raise and support armies (Clause 12), to make rules for Government and regulation of the land and naval forces (Clause 14), to provide for calling forth the Militia to execute laws of the Union and repel invasions (Clause 15), to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the Government of U. S. A. or in any Department or officer thereof (Clause 18).

We may add that in Art. III Cl. (3) it is said that the trial of all crimes except in cases of impeachment shall be by jury. Clause (1) states that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish. As we have already stated Martial Law is deemed as 'no Law'. The trial in it is not by a jury and so it is not a Criminal Trial in accordance with Art. III Cl. (3) aforesaid. Compendiously Martial Law includes all Law that has reference to or is administered by the military forces of the State. Martial Law as already adverted does not however abrogate civil law and civil guarantees. Martial Law is used during times of war and within the territory or theatre of war, in

44. *Mayer* v. *Peabody* (1909) 53 Law Ed. 410.

45. *In re* Clifford & Sullivan (1921) A.C. 570.

which case popular writs as *Habeas corpus* etc., will be suspended. But as stated in *Ex parte Mulligan*[46] : "Actual necessity and not constructive declaration, alone will furnish justification for substituting martial for civil law . . . . . Martial Law cannot arise from a threatened invasion. The necessity must be actual, and present, the invasion real such as effectively closes the courts and deposes the civil administration".

It is best to test the legality of an act (under Martial Law) by all the attendant circumstances necessitating promulgation of Martial Law. The fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.

It is the President of U. S. A. as Commander of all the forces empowered to repel domestic disorder in the States on the application of the executive or the State Legislative. He can act without such application if it is a case of resistance to execution of Federal Laws[47] and promulgate Martial Law towards that end. A military officer is protected for all acts done in the discharge of his duties, in good faith[48]. But after the emergency is over he will be answerable to the ordinary courts for all acts done beyond reasonable necessity. In America there is no legislative power to pass an Act of Indemnity. Where Martial Law is prevalent, the President can appoint military commissioner or military courts. Such courts can try even civilians for military offences committed in the Martial Law area. But if the place of offence is far beyond the theatre of war or insurrection there is no presidential power to establish a military court. The Civil Courts functioning there alone can exercise the jurisdiction. Civil Courts can determine whether a state of war exists[49]. If courts martial act without or in excess of jurisdiction, their orders can be reviewed by Civil Courts. But if they act within jurisdiction there can be no such review[51]. Writ of *Habeas Corpus* is the usual remedy when courts martial exercise illegal or excessive jurisdiction[52]. No Military court can try a person who is not in military employment for an alleged military offence in places where civil courts are functioning[53], since by the constitution of American Right of Trial by Jury is vouchsafed to every one accused of crime provided he is not attached to the army or navy or militia.

India.

This article postulates the Restrictions on Rights conferred by Part III of the Constitution while Martial Law is in force in any area. It offers an indemnity to personnel of the armed forces or those connected with the maintenance or restoration of order within India, for all acts done within an area where Martial Law is in force. The indemnity validates any sentence passed, punishment inflicted, forfeiture ordered or other acts done under Martial Law in such area. But this power is a legislative power which can be invoked only by parliamentary legislation, the absence of which will make all orders and acts done under Martial Law, as illegal as opposed to the ordinary law of the country.

46. (1868) 4 Wall 2.
47. *In re* Debs (1895) 158 U.S. 564.
48. *Mayer* v. *Peabody* (1909) 212 U.S. 78.
49. *Ex parte Miligan* (1866) 4 Wall 2.
50. *Grivens* v. *Zerbst* (1921) 255 U.S. 11 (19).
51. *U. S.* v. *Pridgeon* (1894) 153 U.S. 48: *Reaves* v. *Ainsworth* (1911) 219 U.S. 296.
52. *Ex parte Merryman* (1861) Fed. Case 9487.
53. *Ex parte Milligan* (1886) 4Wall 2.

It may be noted that the Legislative Entry 1 of List II speaks of public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power). Entry 2 of List II speaks of 'Naval, Military and Air Forces any other armed forces of the Union'. But there is no entry for 'martial law'. So we have to look to the residuary entry in Entry 97 List I which refers to 'Any other matter not enumerated in List II or List III including any tax not mentioned in either of these Lists'. It is this wise that Parliament deserve the legislative power to declare Martial Law or use the armed forces to re-establish civil order. Art. 34 makes it further clear by giving the power of indemnity to Parliament. Military used in an executive sense to aid civil authorities do not oust jurisdiction of civil courts for wrongs done. It is only when Martial Law is declared that the Military takes up the entire charge of administration of the area inclusive of civil authorities and courts of law, which latter then cease to function. Military Law and procedure then guide the courts martial.

Art. 34 postulates that Parliament may impose Martial Law in the 'continental sense' even within the territory of the Indian Union where insurrections or grave emergencies occasion such a resort. Hence this is different from 'Martial Law' as administered by a Military commander in occupied area. Art. 34 indemnifies not only Military personnel but also to any one (civil authorities or police etc.) for acts done by him in connection with the maintenance or restoration of order. This obviously includes special police action and protects the police forces also. The indemnity is for acts done to maintain order or acts done to restore order after a rebellion, rioting etc.

As Art. 34 validates 'sentences passed' it implies the parliamentary power to create military tribunals whose jurisdiction may not be questioned during the emergency. But after the emergency period civil courts can question their authority and all orders passed by them unless protected by Parliamentary indemnity under Art. 34. But this power of indemnity cannot be assumed by the Military for all wanton acts or callous acts. In England only bonafide acts were protected[54] vide Act of Indemnity (of England) 1920 soon after the World War I. It may be noted that the word 'purported to be done' is absent in Art. 34. Hence it is left to the discretion of the Parliament to extend protection of indemnity only in cases of bonafide acts. The English practice is commended in this respect.

Courts martial constituted under the Indian Army, Navy and Air Force Acts are special tribunals. But if they act without jurisdiction or against principles of natural justice a writ of *Habeas corpus* can lie against their judgment[55]. But mere insufficiency of evidence is no ground for interference by the High Court so long as there was a hearing that has not offended principles of natural justice. But courts martial are not 'criminal proceeding', in the ordinary sense. This is so even when they try offences committed under the ordinary law[55]. While Art. 33 deals only with armed forces, Art. 34 deals with also to other people. Act of Indemnity can be passed to protect both the officers of the army as well as civil authorities or any one charged with or who has assisted in the maintenance or restoration of order[56]. So far as foreign troops are concerned during war they are governed by 'International Law' and not by Art. 33 or 34. Art. 33 refers to validity of Military Law while Art. 34 validates acts

54. *Phillips* v. *Eyre* (1869) 4 R.B. 224.
55. Vide *Meads* v. *K. Emp.* (1944) 49 C.W.N. (F.R.) 23: Upheld in *Meads* v. *King* (1948) 52 C.W.N. 834 (P.C.).
56. *Meads* v. *Emperor* A.I.R. 1946 Lah. 112.

done under Martial Law. But acts done must be of the category 'honestly done in the Suppression of Rebellion and under pressure of the most urgent necessity'[57], Act done in callous disregard to humanity cannot get such validation by an indemnity[58]. But acts done in good faith though on insufficient material may be protected[59]. But indemnity should not be granted in such a way as to invoke remarks such as by Cockburn J. In *Phillips* v. *Eyre*[60] already *manifest* "in order to cloak '*manifest* violation of Justice."

Once the emergency is over the force of Martial Law vanishes. No courts martial can function. Then as clearly indicated in the famous Wolftone's case[61] Wolftone the Irish Rebel was sentenced to death by courts martial for participation in the Irish Rebellion following the French invasion. An *Habeas Corpus* writ was filed in the Irish King's Bench who held when the civil courts were functioning there is no jurisdiction for courts martial. Martial Law cannot co-exist with Civil Law and on this sole ground the writ was allowed. Art. 34 makes it clear by the very fact of violation that courts martial are not courts of law. But for the validating Act, their judgment can be questioned in a civil court. The opinion of Lord Halsbury[62] that 'where actual war is raging acts done by Military authorities are not justiciable by the ordinary tribunals is open to doubt. Art. 34 is however clear on this matter as it insists on validation by legislative action. There can be no general supplanting of civil Government by Martial Law unless for an emergency[63].

Legislation to give effect to the provisions of this Part.

Article 35.—Notwithstanding anything in this Constitution.—(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament ; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part ;

and Parliament shall, as soon as may be after the commencement of this Constitution make laws for prescribing punishment for the acts referred to in sub-clause (ii) ;

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation.—In this article, the expression "law in force" has the same meaning as in article 372.

57. *Phillips* v. *Eyre* (1869) 4 Q.B. 225. 38 L.J.Q. 113.
58. *Wright* v. *Fitzgerald* (1799) 27 State. Tr. 759.
59. *Mayer* v. *Peabody* (1909) 53 Law Ed. 410.
60. (1869) 4 Q.B. 225.
61. (1798) 27 St. Tr. 614.
62. *Marais* v. *General Officer Commanding* (1902) A.C. 109 Questioned by Jurists as Dr. Holdsworth and Sir Frederick Pollock. *Vide* Law Quarterly Review Vol. 17.
63. *Mincan* v. *Kahanmoker*, (1946) 327 U.S. 304.

FOREIGN CONSTITUTIONS.

Burma.

Art. 39 of the Burmese Constitution posits :

"The parliament shall make laws to give effect to those provisions of this chapter which require such legislation and to prescribe punishment for those acts which are declared to be offences in this chapter and are not already punishable ".

COMMENT.

India.

Article 35 cl. (a) is prospective while clause (b) is retrospective in respect of certain legislation. It will be seen the 'fundamental rights' have to be carefully guarded. Punishment is provided for violation of certain fundamental rights and legislative power is extended for their protection. Some of the provisions of Part III of the Constitution deal with these aspects and to ensure uniformity throughout India in this regard, legislative power is limited to the Parliament and denied to the State legislative.

We shall now see certain provisions such as Art. 16 (3), 32 (3), 33, 34, 17 and 23 (1) all these postulate legislation. Thus :—

Art. 16 (3). Prescribing residence within a state as a condition for employment in a State.

Art. 32 (3). Empowering courts other than the Supreme Courts and High Courts to issue Writs for enforcement of Fundamental Rights.

Art. 33. Abrogation or restriction of Fundamental Rights in so far as members of armed forces and the police—in the interests of discipline and efficiency.

Art. 34. Interest of discipline and efficiency. Indemnity after Martial Law.

All the above will come under sub-cl. (1) of Art. 35 (a) as requiring legislation only by Parliament. Under 35 cl. (a) (ii) come provisions which declare offences. Thus :—

Art. 17. Prescribing punishment for enforcement of any diability arising out of untouchability which is declared as an offence.

Art. 23 (1). Traffic in human beings and imposition of Begar or similar form of forced labour are offences.

For the above also there has to be Parliamentary Legislation. It may be noted that so far as Arts. 16 (3), 32 (3), 33 and 34 are concerned in the article itself there is a declaration that Parliament shall have the power. So Art. 35 (a) (I) in this regard is only an additional emphasis stating clearly that the State Legislature has no such power. But so far as Arts. 17 and 23 are concerned the Authority which can prescribe the punishment is not stated. Art. 35 (a) (ii) clearly gives this power to Parliament only.

Art. 35. Clause (b).

This deals only with prospective legislation. It validates all laws at the commencement of the Constitution which may relate to matters covered by clause (a) of Art. 35. This validation enures only until Parliament later, repeals or

amends such law. We have for this an example in the Army Act 8 of 1911 which continued valid till the recent Army Act 46 of 1950 was passed after the commencement of the Constitution. In *R. Chatterjee* v. *Sub-Area Commander*[64] an occasion arose to declare that the restrictions or curtailments of Fundamental Rights to the Armed Forces under the Army Act of 1911 got validated by cl. (b) of Article 35, even though the prior Act was not passed by Parliament. In relation to offences the Allahabad High Court held[65] that Act 14 of 1947 (The U. P. Removal of Disabilities Act) imposing punishments for enforcing certain customary disabilities of scheduled caste members was *intra vires*. This was so because Art. 35 (a) and 35 (b) clinched the issue and validates all such prior laws though not passed by Parliament. Similarly, the Suppression of Immoral Traffic Act (Bengal Act 6 of 1933) was held valid[66] as it prescribed punishment for traffic in human beings.

Art. 16 (3) read with Art. 35 (a) empowers Parliament only to make a law prescribing requirements as to residence within the State. This does not take away the power of the State Legislature to prescribe conditions of service and recruitment which is provided for in Art. 309[67].

Art. 37 connotes only a prospective application and laws in force in a State before the commencement of the Constitution are specially saved and are to continue until altered, repealed or modified or amended by Parliament. Powers of State legislature to make laws prescribing punishments for offences declared so under Art. 17, are now withdrawn by Article 35, vesting the same in Parliament[68]. The Constitution (Application to the Jammu and Kashmir) Order, 1954 is not in excess of the powers of the President under Art. 370 (1)d read with Art. 35[69].

The Allahabad High Court[69a] upheld the validity of *The Suppression of Immoral Traffic in Women and Girls Act* (1956) under Art. 23 and Art. 35 of the Constitution. The Act in question punished acts which in effect was traffic in human beings. The contention that it offends the fundamental right of the prostitute to ply her trade under Art. 19 was turned down since the prohibition contained in Art. 23 overrides the right in Art. 19.

The Constitution (Application to Jammu & Kashmir) Order, 1954.

The Constitution (Application to Jammu and Kashmir) Order, 1954[70] was promulgated by the President and therein a new clause to Article 35 was added.

Art. 35 Clause (c).

No Law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this part, but any such law, shall to the extent of such inconsistency cease to have effect

64. 1951 Mad. 777: I.L.R. (1952) Mad. 153.
65. *State* v. *Gulab Singh* A.I.R. 1953 All. 483-1953 Cr. L.J. 1103.
66. *Raj Bahadur* v. *Legal Remembrancer* 1953 Cal. 522-1953 Cr. L.J. 1987 (D.B.).
67. *P. Raghumattra Rao* v. *The State of Orissa* A.I.R. 1955 Or. 113.
68. *State* v. *Kishan* A.I.R. 1955 M.B. 207.
69. *Mahammad Subhan* v. *State* A.I.R. 1956 J & K. 1.
69a. *Shama Bai* v. *State of U.P.* A.I.R. 1959 All 57.
70. *Vide* Gazette of India (Extraordinary) Part II, Sec. 3 Page 821 dated 14th May, 1954.

on the expiration of five years from the commencement of the said order, except as respects things done, or omitted to be done before the expiration thereof.

The above provision was impugned in *Lakamphal P. L.* v. *State of Jammu and Kashmir*[71] but it was held *intra vires* of the powers of the President under Art. 370 (1).

The same Constitution order added the following new Article 35 A for Jammu and Kashmir :—

ARTICLE 35 A:

"*Saving of Laws with respect to permanent residents and their rights* :—

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir and no Law hereafter enacted by the Legislature of the State—

(a) defining the classes of persons who are or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government ;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State ; or

(iv) right to scholarships and such other forms of aid as the State Government may provide shall be void on the ground that it is inconsistent with or takes away, or abridges any rights conferred on the other citizens of India by any provision of this Part ".

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71. A.I.R. 1956 S.C. 197 : 1956 S.C.J. 236.

PART II

CHAPTER XI

DIRECTIVE PRINCIPLES OF STATE POLICY

(Part IV of the Constitution)

India.

Fundamental Rights outlined in Part III of the Constitution and Directive Principles of State Policy in this Part IV are complimentary to one another and are the basic foundations on which the structure of our Constitution is built, giving it all the scope to herald, promote and foster a truly socialist society and Welfare State. The Directive Principles are in no way inferior to Fundamental Rights and as stated in Art. 37 they, though not enforceable in courts of law, are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

There has been some unnecessary misconception about the scope of these Directive Principles. Even Mr. Durga Das Basu in his learned commentaries on the Constitution[1] has stated, "When all is said, a detailed treatment of the directives would be out of place in *a judicial commentary* inasmuch as they are non-justiciable. No court would be entitled to declare any legislation as invalid on the ground that it does not conform to the spirit of any of the Directive Principles". We regret the position taken by Mr. Basu and respectfully disagree with such a view. Apparently, there is a feeling that the Directive Principles are inferior and subordinate to Fundamental Rights and that they are of no practical significance. At the time of their formulation in the Constituent Assembly by the fathers of the Indian Constitution, the whole scheme was motivated by an earnest desire to have permanent constitutional directive to guide the Nation in its onward march to a full-fledged socialist state. Dr. Ambedkar then put it thus[2]: "The Directive Principles are like the Instruments of Instructions which were issued to the Governor-General and the Governors of the colonies and to those of India by the British Government under the 1935 Act. What is called Directive Principles is merely another name for Instrument of Instructions. The only difference is that they are instructions to the legislature and the executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them".

But there were critics who called these Directives as a set of new year resolutions[3] or as 'a cheque on a bank at the convenience of the bank'[4] or as

1. Page 231, 2nd Edition.
2. See Constituent Assembly Debates. *Vide* also A.I.R. 1951 Punjab 93. *Om Prakash* v. *State of Punjab.*
3. *Vide* (1953) 1 M.L.J. (Journal) 9 (II) View of Mr. Nasiruddin.
4. *Vide* (1953) 1 M.L.J. (Journal) 9 (II) View of Mr. K. T. Shah.

'subsidiary to fundamental rights'[5] or condemned outright as 'declarations of a purposeless piety destined and even designed to remain barren and superfluous'[6]. Over and above this we have a most damaging position envisaged against Directive Principles in the Dictum of Mr. Justice Das in *Sm. Champakam Dorairajan* v. *State of Madras*[6] to the effect: "The Directive Principles of State policy which by Article 37 are expressly made unenforceable by a court cannot override the provisions found in Part III which notwithstanding other provisions are expressly made unenforceable by writs, orders or directions under Article 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or excessive act or order except to the extent provided in the particular Article in Part III. The Directive Principles of State Policy *have to conform to and run subsidiary to the chapter on Fundamental Rights.* In our opinion that is the correct way in which the provisions found in Parts III and IV have to be understood".

The above dictum would urge the alleged superiority of the Fundamental Rights over the Directive Principles. The latter are asked 'to *conform to* and run subsidiary to the former'. If so, why then should there be any Directives at all? This is a rank overstatement of an alleged inherent and uncompromising superiority of Fundamental Right as such. We believe it will be more appropriate to consider the Directive Principles as defining and delimiting the fundamental rights of the individual in the concept of society as a whole. What Part III outlines for the individual Part IV outlines for the entire fabric of society in which the individual is but a component part. Ordinarily, there can be no conflict between the two but if it arises, it is capable of resolving the conflict if only it is remembered that the Directives are there to tame 'the wild extravagance of the assertion of the individual regarding his fundamental rights'. In other words, the tendency of conservatism in an individual to over assert his alleged Fundamental Rights to the detriment of the free growth of a free social welfare state, must be checked, regulated and rationalized by the adherence to what are called, 'The Directive Principles of State Policy'. The latter are a permanent charter of freedom as important as fundamental rights. The latter are the present irreducible minimum of rights of the individual in a free democracy while the Directive Principles are the charter for the future welfare of the State. The state can be likened to a ship which must steer itself along the clear and safe way outlined in the 'Directive Principles' to reach the haven of a truly welfare state. While fundamental rights are justiciable it is not as if courts can ignore the Directive Principles of State Policy altogether. It is the function of courts to try as far as possible for a harmonious interpretation whenever there is an apparent conflict between the principles set out in Part IV and the Rights guaranteed in Part III.

A notion that Part IV is subordinate to Part III is neither a happy solution nor is it a proper conclusion. Part IV is in no wise inferior on the score that courts cannot enforce the 'Directives'. The gist of superiority cannot be smelt out of the test of "justiciability". Even in the old ways of Dicey, conventions had their sanction by usage though they were not Laws as such. Later this criterion of justiciability as the test of a 'Law' vanished. Conventions were really customary Laws of the land. The further growth of ad-

5. *See* Art. on 'The Constitution of the Indian Republic' by Mr. M. Ramasamy in (1950) Canadian Bar Review at P. 14.

6. 1951 S.C.J. 313-A.I.R. 1951 S.C. 226-(1951) D.L.R. 239 (S.C.).

ministrative law and administrative justice encroached on the monopoly of Courts in administering justice and statute laws. So to correctly put it, if the Directive Principles are made non-justiciable, it is simply because courts are not suited to administer them. They are nevertheless binding legal principles —'Law in fact' but only they have to be adhered to by the State in its function as a administrative and legislative agency. It is the result of separation of functions that these 'Directions' are particularly termed as 'Directive Principles of State Policy'. Article 37 enjoins them as fundamental in the governance of the country.

It must be remembered that the preamble of the Constitution and the Directive Principles of State Policy declare conjointly the aims and aspirations of the people of the Indian Republic to secure :

(a) Justice, social, economic and political,

(b) Liberty of thought, expression, belief, faith and worship,

(c) Equality of status and opportunity,

(b) Fraternity asserting the dignity of the individual and unity of the nation.

The Directive Principles merely amplifying some of the objectives set out in the preamble by enjoining on the State:

1. to secure a social order for the welfare of the people (Art. 38).

2. (a) to assure the citizen to an adequate means of livelihood,
   (b) to see that there is a proper distribution of the ownership and control of the material resources of the community in the interests of the common good,
   (c) that there is no concentration of wealth and means of production to the common detriment,
   (d) that there is equal pay for equal work for both men and women,
   (e) that conditions of work do not infringe health laws,
   (f) that children and youth are protected against exploitation, moral and material abandonment ..... (Art 39).

3. to organize village panchayats as units of self-government (Art. 40).

4. to assure the right to work, to education and to public assistance in cases of unemployment, old age, sickness etc., (Art. 41).

5. to provide for just and humane conditions of work and for maternity relief ..... (Art. 42).

6. to secure living wage, conditions of work, leisure etc. (Art. 43).

7. to secure a uniform civil code for the entire Republic of India ..... (Art. 44).

8. to provide within ten years provisions for free and compulsory education for children. (Art. 45).

9. to promote educational and economic interests of scheduled castes, scheduled tribes and other weaker sections. (Art. 46).

10. to raise the level of nutrition and standard of living and to improve public health. (Art. 47).

11. to organize agriculture and animal husbandry, foster and protect them. (Art. 48).

12. to protect monuments, places and objects of national importance (Art. 49).

13. to effect separation of the executive and the judiciary (Art. 50).

14. to promote international peace and security (Art. 51).

It may also be remembered that Rights to Equality, Right to Freedom of speech, movement, life and liberty, Right against exploitation, Right to Freedom of Religion, cultural and educational rights, Right to property and Right to constitutional remedies, have all been dealt with in Part III (Arts. 14 to 32). The various Rights are also restricted by certain limitations in the interest of the common good. These are individual Rights and individual restrictions, and the affected person can have recourse to a writ. But apart from these Rights there are larger rights of the social fabric which is rightly vested in the trusteeship of the State. These larger rights are in the shape of Directives in Arts. 38 to 51 and it is the State that must enforce them by administrative and legislative sanction. Fundamental Rights were conceived to liberate the citizen from the shackles of a feudal system while the Directive Principles liberate him from the economic enslavement of a capitalistic system. The Directive Principles are the antidote to any fungus in the fabric of society that may be created by too much insistence on rights buttressed by the legal sanction of Part III of the Constitution. They are the new guiding steps to human happiness and emancipation and in a way they restate the fundamental rights anew allowing scope for new experience and fresh needs in a growing State. So it is petite to reverse what Das J. stated[6] and instead of the Directive Principles conforming and being subsidiary to Fundamental Rights, it is the latter that should conform to and seek a happy synthesis with the declared Directive Principles of State Policy. So courts of law should deem it their duty to seek such a happy synthesis in their interpretative jurisdiction. As shown below, American experience had paved the way for the interpretative jurisdiction of a supreme court to mould the pattern of society and law of the land from time to time in accordance with the changing times. For this an amendment of the Constitution is necessary. What is there already in Arts. 14 to 51 is enough for the judicial interpretative mind to help the onward march of the truly welfare State as India. Thus we have in *State of Bihar* v. *Kameshwar Singh*[7] a typical example where the Supreme Court of India had used the Directive Principles to guide the court in determining crucial questions on which the validity of an important statute as the Bihar Land Reform Act hinged. The contention in the instant case was that the statute was invalid inasmuch as there was no 'public purpose' to sustain the acquisition of lands. Mr. Justice Mahajan opined that the Act could not fail merely because it fails to postulate a public purpose. "Art. 39 of the Directive Principles of State Policy states as follows : The State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the question of economic system does not result in the concentration of wealth and means of production to the common detriment'. Now it is obvious that the concentration of big blocks of land in the hands of a few individuals

7. (1952) S.C.J. 354 : A.I.R. S.C. 252 at 274.

is contrary to the principle on which the Constitution of India is based. The purpose of acquisition contemplated by the Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible." Mr. Justice Das[8] also met the objection thus "The ideal we have set before us in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as if may be a social order in which social, economic and political justice shall inform all the institutions of national life. Under Article 39 the State is enjoined to direct its policy towards securing, *inter alia*, that the ownership and control of the material resources of the community are so distributed as to subserve the common good . . . . . in the never-ending race the Law must keep pace with the realities of social and political evolution of the country as reflected in the Constitution. If, therefore, the State is to give effect to those avowed purposes of our Constitution, we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these Directive Principles of State Policy, whatever else that expression may mean . . . . . In the light of this new outlook what I ask, is the purpose of the State in adopting measures for the acquisition of Zamindaries and the interests of the intermediaries. Surely it is to subserve the common good by bringing the land which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This state ownership or control over land is a necessary preliminary step towards the implementation of Directive Principles of State Policy and it cannot but be a public purpose".

So we see Das J., in a different role approving of the Directive Principles as a good yardstick for the interpretation of a clause viz., 'public interests' in the Fundamental Rights. Das J. appeared priorly[6] to feel that the Directives are subordinate to the Fundamental Rights and that the former must conform to the latter. Now in the instant case[7] there is a welcome change in his Lordship's outlook and he went so far as to state. "We must not read a measure implementing our mid 20th century constitution through spectacles tinted with the early 19th century notions as to the sanctity or inviolability of individual rights". His Lordship in the instant case approved of the requisition of arrears of rent also and stated "If the acquisition of Zamindaries and the tenures, is as I hold, dictated or inspired by the sound public purpose of ameliorating the economic and political conditions of the actual tenant the self-same public purpose may well require the acquisition of arrears of rent so as to avert the undesirable but inevitable consequences as I have mentioned '—i.e., the sale of holdings for arrears of rent, reducing the bulk of the tillers of the soil' to become landless and the entire scheme of land reform envisaged in the Act will be rendered wholly nugatory". The majority opinion in the instant case[7] was however against acquisition of arrears of rent as it was meant merely to procure funds for the Government for paying compensation to Zamindaries.

All that we wish to state is that it is wrong to urge that Directive Principles are mere 'new year resolutions' not to be noticed by a court of law. For instance, whenever Parliament implements these Directive Principles by specific legislation, courts have to see how far there is compliance or variance with Directive Principles. The conflicts between Part III and Part IV have

8. *Ibid.* A.I.R. 1952 S.C. 252 at 290.

also to be resolved by the courts. So it is futile to state that courts and lawyers can be indifferent to the enunciation and practice of these Directive Principles which govern 'State Policy'. In Ireland, the term used is 'Social Policy' affecting society. But in India the heading itself is 'State Policy' and Art. 37 makes it an integral aspect of State Policy to consider these as 'fundamental' directives for the proper constitutional governance of the country. If these directives are disobeyed by the Government and the party in power, it is certainly unconstitutional. We would like to quote here the authoritative opinion of Mr. Alan Gledhill's[9] in his book on the 'Republic of India': "Most of the Directive Principles (Arts. 36-51) would be found in any literal manifesto, and it is refreshing to find India taking her stand on political principles established after centuries of struggle in the West and now all too frivolously and wantonly questioned and abandoned ..... (Mr. Gledhill here discusses the preamble to the Constitution and the clauses of Directives. Though one may doubt whether fraternity is susceptible of legal control, these aims are explained in the Directive Principles ..... It would be superficial to dismiss these precepts (Articles 36 to 51) as good Resolutions fit only for paving stones on the broad and primores-strewn way. The lives of countless individuals have been shaped and redirected by moral precepts impinging upon their minds, and it is not difficult to find instances of similar precepts directing the course of the History of nations (viz. the Magna Carta of England) ..... In 1776, the preamble to the American Declaration of Independence said that it was self-evident that all men were created equal, endowed with the unalienable rights to life, liberty and the pursuit of happiness and the Governments derived their powers from the consent of the governed for the purpose of securing their rights. The influence of these words upon the American social and political development has been considerable but they are not enforceable nor are they part of the American Constitution." The learnd author continuing applauds the Indian Directive Principles and said: "If as is to be hoped the Directive Principles are taught to every Indian school boy, they may have great influence, not only on India but on the world. If the Indian Constitution becomes vested with the scope of sanctity essential to its durability, it will be difficult for any public figure to propose any important Legislative measure without making an appeal either to the Fundamental Rights or the Directive Principles. Measures will be attacked by the opposition as unconstitutional in so far as they conflict with the Directive Principles. Even though the principles are not directly enforceable in a court they are bound to affect decisions of courts on constitutional question just as the provisions of the Magna Carta have affected the decisions of English Judges and the Declaration of Independence has affected the American Judges. If the words of the Constitution are clear and unambiguous, the court will give effect to the plain meaning; if not, it will have regard, not to political or constitutional theory, but to the scheme of the Constitution and the Directive Principles are part of the scheme. Many of the Fundamental Rights are subject to reasonable restrictions in the interest of the general public. In interpreting those rights, the courts will be obliged to lay down canons for determining what is reasonable and it is impossible that a restriction should be reasonable if it offends against these directive principles".

Thus we see that to call our directive principles as a mere political manifesto without any legal sanction[10], vague and indefinite serving no useful

9. The Republic of India, pages 161-162.
10. *See* 54 C.W.N. Lii (Liv.) Prof. Kenneth C. Wheare of Oxford on 'India's New Constitution'.

purpose[11], or a mere moral homily or manifesto of aims and aspirations, yet a clear perception will demonstrate the utility of these Directives as the sheet anchor of Indian Constitutional history. They are the authoritative declarations of aims and aspirations of the Indian people solemnly formulated by themselves for themselves—not a mere temporary will of the people but a permanent charter created by the permanent will of the people, so edicted in the Constitution itself so as to make it immutable and unalterable unless by resort to the Amending clauses of the very Constitution. These are no mere moral Directives. They are constitutional Directives. When even the constitutional conventions of England have in the words of Sir Berridale Keith[13] 'the sanction of the force of law, certainly the constitutional directives in India have a compelling force on the three organs of the State, the Executive, the Judiciary and the Legislature'.

No popular ministry can afford to ignore Part IV of the Constitution[14]. It will be foolhardish for them to light-heartedly brush aside these directives. A vigilant and lively public will then give the answer and turn out the ministry. So much depends upon an informed public to use these provisions in Part IV as the questionnaire to any Party who seek their franchise. It is as much the duty of the State to follow the directives. The Legislature and the Parliament will be acting unconstitutionally if they repudiate the Directives and legislate contrary to the principles in Part IV. Then again the court is there to veto such legislation as unconstitutional.

In a scheme where there is a separation of function there is no inferiority or superiority as between the Legislature, Executive and Judiciary. They are coordinate bodies or agencies of the State complimenting one another and not antagonistic rivals in the bid for power, for power itself is divided according to their respective spheres. Our Constitution envisages a balanced co-ordination of authority.

We may envisage then, the following three salient factors :

1. The law-making organ of the State should apply the Directive Principles in making the law. Otherwise the law will be unconstitutional and illegal if the law runs counter to Arts. 36-51.

2. While the court should positively enforce Fundamental Rights it shall not do so in respect of Directive Principles.

3.(a) But courts should resolve all conflicts between Fundamental Rights and Directive Principles with an eye on the fundamental spirit of the Constitution and with a view to harmonise all differences, if that is possible and feasible.

(b) Courts should also see that the Legislature does its duty as also the executive vis-a-vis laws that affect the Directive Principles. Any transgression of the latter must be deemed as against constitutionality of the law.

The need for closely scrutinizing the Directive Principles vis-a-vis Fundamental Rights will be clear if we study in the following way :

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11. 1950 Canadian Bar Review P. 14. Mr. M. Ramasamy's Article.
12. Pro. Wheare *vide* 54 C.W.N. Liv.
13. *Vide* His Edition of Ridge's Constitutional Law of England.
14. *Vide* 1953 (I) M.L.J. Journal 9 (ii). Sir Alladi Krishnaswamy's Speech in the Constituent Assembly.

1. The right to practise any profession (Art. 19 G) gets clarified when we take into account the need for the State to see to the health, and strength of workers, men and women and the teen-aged children [Art. 39 (c)]. Hence Laws protecting the latter are quite constitutional.

2. Article 29 (1) posits that a minority is entitled to conserve 'the culture of its own' while Art. 44 postulates the need for a uniform civil code in India. Will not the latter abrogate the former in the long run?

3. Equality of opportunity in the matter of employment to any office in the State (Art. 16) should be read alongside obligations of the State to promote the economic and other interests of the weaker sections of the people (Art. 46).

4. Restriction of rights in the interest of the public in Part III should be correlated to the public purposes outlined in the Directive Principles. Any purpose which runs counter to Part IV may not be in the interests of the public.

It will be petite to quote from a very informative Book on 'Evolution of the Indian Welfare State'[15]. Part III defines and guarantees protection of the individual's liberty restricted in its operation by public interest. Part IV defines and guarantees in an indirect way the same liberties to the individual considered as part of the Society or the community and by implication enables State Legislatures to pass measure of social and economic reform without prejudice to the rights mentioned in Part III. Part IV is really the impact of socialistic forces on Part III which is political democracy. The result of their conjoint constitutional effect and a progressive interpretation by the Judiciary will in due course establish democratic socialism in India . . . . . it is a matter of profound satisfaction that the judgment of the Supreme Court in Bihar Zamindari case (1952 S.C.J. 334) (S.C.) contains observations that go to show that Law after all is an instrument of social progress". Once again the learned author postulates[16]. "The Indian Constitution offers a compromise between the indictment of Tocquille that socialism makes a zero of individual liberty; and indictment of Stalin that Democracy in capitalist countries is only the democracy for the strong or for the propertied minority. The Indian Constitution serves to compromise two extremes and coalese them. The Indian Welfare State is also a synthesis of Bertrand Russel's definition of Anglo Saxon Democracy as the rule of the majority and the Russian view of democracy, that it consists in ruling in the interests of the majority, these interests being determined in accordance with Marxist Political Philosophy".

We would like to conclude this desertation on 'Directive Principles of State Policy' with one observation :—

The dictum in *State of Madras* v. *Champakam Durai Rajan*[17] that Part IV is subservient to Part III is not, it is respectfully submitted quite rational or sound. Their Lordships stated "The Directive Principles of State Policy have to conform to and to run as subsidiary to the chapter of Fundamental Rights. In our opinion that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement

15. By Sri C. S. Subramanya Ayyar (M.L.J.) P. 23.
16. *Ibid.* Page 30.
17. (1951) S.C.J. 313 (S.C.)-(1951) 1 M.L.J. 621.

of any fundamental right, to the extent conferred by the provisions in Part III, there can be no objection to the state acting in accordance with the Directive Principles set out in Part IV but subject again to the Legislative and Executive Powers and limitations conferred on the State under different provisions of the Constitution". These observations arose on an adroit argument that the so-called communal G. O. of Madras was but carrying out the principle set out in Art. 46. But the protection of Backward Classes envisaged in Art. 16 in the case of appointments is absent in the case of admissions to educational institutions in Art. 29. The mere fact that Art. 46 asks the State to promote with special care the educational and economic interests of the weaker sections of the people cannot cure a G. O. based on communal representation for admission to state colleges. Here Art. 29 is specific and admits of no exception. There is no question of superiority of Art. 29 to Art. 46. When a Fundamental Right is clear in its terms specific rules of interpretation would not admit any resort to a Directive Principles. After the decision in the Champakan's case[17] an amendment of the Constitution was made to Art. 29 in the shape of clause (4) which allows the State to make any general provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes. Only when there is a doubt as between Parts III and IV, can there be a resort to the help of the Directive Principles to understand the rights set out in Part III. But in the instant case[17] there was no doubt as Art. 29 was clear and eschewed all considerations similar to Art. 16. It was therefore a clear rule of interpretation that a fundamental right when it is clear in its terms must be so upheld by the Court. It is for the Legislature to bring the law into conformity with Art. 46 which it has done now by the said constitutional Amendment. So we wish to state it is not appropriate to term Part III as superior to Part IV as they pertain to different spheres of implementation. Part III is to be implemented by courts while Part IV is to be implemented by the State. Once the State makes a law in conformity with Part IV, court's jurisdiction steps in to assess if it is constitutional and *intra vires*. Hence it is unhappy to state that Part III is in any way superior to Part IV. It is like saying the State or Parliament is subordinate to courts. For in a constitution, the State, Executive, Legislature and Judiciary are only co-ordinate bodies with distinctive spheres of action in which there can be no trespass by one or the other.

Hence if courts are to decide and enforce Fundamental Rights and the State is enjoined to adopt the Directive Principles in the governance of the country where comes 'any superiority' at all except that each is a different sphere altogether. 'Justiciability' can never be the test of 'superiority'. In a growing welfare state the tendency will be to make more things non-justiciable. 'Administration Justice' will be the nomenclature to clothe the executive's action. Directives that have a compelling force on the Executive, are as much important, if not more important than what are called 'Justiciable Rights'. In actual practice more things are done in the name of Executive power than are dreamt of by the common man. Since the modern tendency of an ill-informed democratic people is to oust jurisdiction of courts, such a provision as compulsory directives for the executive is indeed a boon to the community as that is the only good and sure way to control the fissiparous tendencies of political parties who may entrench themselves in power. Some political adventures will call themselves as trustees of the people but commit breaches of trust. They may assert that what they think is good for the people and this has to be implicitly accepted by the people. It is to cure such mid-summer madness of political aspirants, that the Directive Principles of State

Policy is envisaged so that no political party which is in power, adumbrate a policy of their own dreams which may destroy all the Fundamental Rights vouchsafed in Part III of the Constitution. If the Directive Principles are erased the Fortress of Fundamental Rights might not withstand the periodical legislative onslaught by power-mad politicians. It is to keep in check such political forces, that there is a permanent charter in the guise of Directive Principles to guide them. The Directives are not merely obligatory but compulsory. Hence no political party that is in governance of the State can afford to ignore or bypass these Directives—the Magna Carta of Republic India.

So as we progress in our emancipation as a truly welfare state Jurists, Lawyers, Judges and Administrators will look more and more into the Directive Principles for inspiration and guidance to meet new situations which cannot brook delay. If the Directive Principles were eschewed from our Constitution then we will be left without any 'life giving' or 'driving' force to march onwards to an haven of a truly welfare State. Mere 'Fundamental Rights' cannot solve our future problems. They may merely encourage over assertion of individual rights to the detriment of a freely growing Republic, which may then generate into a fossilized, rigid and conservative polity where public duties and public good will be forgotten in the craze of individualistic assertion of rights and privileges.

We would therefore conclude that the Directive Principles are essential and fundamental in the governance of the country. It is the yardstick for all legislation and the State dare not lay by the yardstick in its executive or legislative aspect. We would in this regard echo Mr. D. D. Basu's[18] opinion that if "any Bill is brought in the Legislature which is in direct contravention of any of these Directives, the President or the Governor may refuse his assent to such Bill on that ground though the court may not declare the Act void if it is passed". We may go even so far as to state that such an act is not a valid statute as it lacks the President's or Governor's assent. The President being a component part of the Legislature (vide Art. 79) and he having the power of veto over Bills under Art. III, it is meaningless to suggest that his veto is of no effect. On any rate it is within the competence of the President to veto the Bill on the ground that it offends the Directive Principle in which event it is the solemn duty of the Legislature to reshape the enactment to satisfy that requirement. Dr. Ambedkar's view[19] that a Constitution does not warrant it does not appear to be proper from a constitutional approach to the problem. But it is permissible to feel if the President will be justified at all in refusing to assent to a Bill when his ministry and Parliament back it. Under Art. III the President can (1) assent to the Bill (2) or withhold his assent (3) or he may return the bill to the Houses for consideration. In the last case if the Houses again pass it, the President is bound to give his assent. In the 2nd case the veto remains and the bill does not become an Act at all. Can this be done since the President always is said to act on his Ministry's advice? We feel that in such cases of veto the Bill is not a valid Law at all. Otherwise the sanctity of the Directive Principles of State Policy lose much of their significance if the Presidential veto is not there to safeguard the Directive Principles from being violated.

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18. D. D. Basu's Commentary on the Indian Constitution, 2nd Edition, page 231.

19. *Ibid.* 231. *Vide* Dr. Ambedkar's Forward to the First Edition of the Book.

OTHER COUNTRIES

America.

There is nothing as "Directive Principles" as such in the American Constitution. Only rights corresponding to Fundamental Rights are inbedded in the constitution. The Constitutional History of America however reveals admirably a gradual shrinkage in the scope of what are 'Fundamental rights' due to the impact of the new socialistic ideology. It must be remembered that when the people of U. S. A. framed their constitution they stated in the preamble that they did so 'in order to form a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and to our posterity". The original constitution had only seven articles the chief of which are :—

Art. I Sec. I. All legislative powers herein granted shall be vested in the Congress of the United States which shall consist of Senate and House of representatives.

Art. II Sec. I. The executive power shall be vested in a President of the United States of America.

Art. III Sec. I. The Judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

Art. IV Sec. I. Full faith and credit shall be given in each State to the Public Acts, records and judicial proceedings of every other State.

Art. IV Sec. 2(1). The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The tendency in America has always been to resort to few amendments. It will be noted that when the original constitution was framed America was young, its industrialization was but in its infant stage. The people did not worry about rights but later as society grew there was an insistence on rights. Thus we find some amendments from time to time in the constitution guaranteeing these rights. Some of them are restated hereunder.

1st Amendments Art. 1. (1791).

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridgement of free speech, or of the press or the right of the people to peaceably assemble and to petition the Government for a redress of grievances.

4th Art. IV (1791).

The right of the people to be secure in their persons, house, papers and effect against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause.....

5th Art. V (1791).

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury.....nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation.

8th Art. VIII (1791).

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

9th Art. IX (1791).

The enumeration in the constitution of certain rights shall not be construed to deny or desparage others retained by the people.

10th Art. X (1791).

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people.

13th Art. XIII (1865).

Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within United States, or any place subject to their jurisdiction.

14th Art. XIV (1868).

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its protection the equal protection of laws.

15th Art. XV (1870).

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous conditions of servitude.

18th Art. XVIII (1919).

After one year from the ratification of this article the manufacture, sale, transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

19th Art. XIX (1920).

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

21st Art. XXI (1933).

Section 1. The Eighteenth Article of amendment to the constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of laws thereof, is hereby prohibited.

We have specified the chronological growth of Amendments in the U.S.A. Constitution from 1791 to 1933. It may be noted that there are no Amendments from 1933 till today, thereby indicating that the constitution of America has matured itself into a stabilized frame so as to satisfy all the modern aspirations of the people in America.

It should be seen that with no directive principles except the preamble of the constitution to guide them the people of America have managed to evolve their society into a full-fledged federal democracy satisfying their socialistic urges to the extent they desired. It will also be seen that in America there was no hesitation to repeal a constitutional provision when it was unsuitable viz., Eighteenth amendment regarding prohibition. The presence of a directive

principle of State policy in India regarding prohibition compels the Government of India to stick to the Prohibition Laws even though there is adequate evidence that it is unworkable. In this field of growing socialistic upsurges, it was not so much the need for amendment of the constitution that was felt as the clever resort they had to the interpretative jurisdiction of the Supreme Court which it was that was really responsible for the growth of American Federal Democracy. Thus for instance before the New Deal Programme of President Roosevelt, courts in America lay more stress on the individual liberties of the citizen and any governmental action, legislative or executive, that affected these rights were looked down with hostile scepticism. But after the New Deal, emphasis shifted to governmental powers than individual's rights, as it was keenly felt that American Society had a clear future if it evolved along the new Deal programme. The Due Process clause of the 5th and 16th Amendments which had been hitherto relentlessly used against governmental action which later deprived Americans of their life, liberty or property without due "Process of Law" became suddenly flexible. We had had priorly instances when governmental attempts to alleviate social distress was knocked down as 'naked and arbitrary exercise of power' and meddlesome interference with the sanctity of Freedom of Contract[20]. In *Lochner* v. *New York*[21] a Statute limiting hours of work for workers in bakeries was struck down on a grandiose declaration that "clear and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week". No thought was then bestowed as to the legislative notice to protect health of the workers. Again in Atkin's case[20] the Statute's object of protecting health and morals of women by prescribing minimum wages for women workers was condemned as a "naked arbitrary exercise of power." The emphasis was in the instant case not on the social question but on the individual's right of contract and the need for earning more to keep pace with the cost of living. In the field of Interstate commerce in *Hammer* v. *Dagentard*[22] a congressional statute which prohibited transportation interstate of goods on whose manufacture child labour was used against prescribed restriction—was struck down on the plea that otherwise 'all freedom of commerce will be at an end' and the power of State over local matters eliminated leading to the destruction of American system of Government. The emphasis was more on state's power and rights arising on commercial contracts than on social evils as engaging child labour.

Even so late as in 1935, we witnessed in *A.L.A. Schecter Poultry Corporation* v. *U. S.*[23] the striking down of the National Industrial Recovery Act which authorised the imposition of 'codes of fair competition' which mainly fixed the number of hours for work days and the minimum wages to be paid to workers. The National Recovery Act was indeed the backbone of the New Deal programme of President Roosevelt which was meant to salvage the country from the unprecedented economic slump of those days (1930). This was an extraordinary emergency akin to a war emergency. But the court said rigidly 'Extraordinary conditions do not create or enlarge constitutional powers'[24]. What was then the chief concern of the court was to demarcate the spheres of Inter-State and Intra-State commerce and how in the instant case it affected the business of slaughter house operations in New York who purchased live poultry imported from without the state of New York from commissionmen but who after the poultry was trucked in their slaughter house markets in Brooklyn, sold it to butchers and

20. *Atkins* v. *Children's Hospital* 261 U.S. 529 at 559.
21. 198 U.S. 45 at P. 59 and 62.
22. 247 U.S. 251.
23. 295 U.S. 495.
24. *Ibid.* at 528.

retail dealers, from whom it was purchased directly by the consumers. The court declared that wherever the poultry was purchased, when it was trucked down to Brooklyn for local disposition the inter-state transaction with respect to that poultry ended. 'The flow of interstate commerce has ceased and the poultry has come to a permanent rest within the State'. It will be thus seen that court never worried the consequences of turning down such a statute which aimed at the National recovery programme but complacently observed that it "was not the province of the court to consider the economic advantages and disadvantages of such a centralized system[25].

Again the Agriculturists Adjustments Act, 1933 was struck down in *U.S.* v. *Butler*[26] as it was not within the legislative competence of congress to regulate agricultural production as that was a state-subject and the Congress power to tax could not be used to 'effectuate an end which is not altogether legitimate'. A tax could never connote the expropriation of money from one group for the benefit of another. A tax could be merely an exaction of the support of the Government as such.

It may be noted however that the instant Act purported to effect a scheme to limit the production of 'basic agriculturists commodities' with a view to establish and maintain such a balance between the production and consumption of such commodities and such marketing conditions, therefore, as will re-establish the prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy.

Thus we saw decisions such as in *U. S.* v. *Butler and Schecter Poultry* case threw cold water on the New Deal programme. But this attitude of courts later underwent a change. Thus we see in *West Coast Hital* v. *Parish*[27] the turning point. It upheld the minimum wage law of the State of Washington which also protected women and child labour. The sanctity of Freedom of Contract so ruthlessly upheld with an undesirable fetish to the detriment of the social polity by the earlier decisions[28] were all questioned or overruled. The Supreme court put the welcome querry[27] "What is this Freedom? The constitution does not speak of Freedom of Contracts. It speaks of liberty and prohibits the deprivation of liberty without due process of Law".

Gradually, the emphasis shifted from the rights or liberty of the citizen to limitation or deprivation of liberty. "Liberty under the constitution is .....necessarily subject to restraints of due process, and regulation which is reasonable in relation to its subjects and is adopted in the interests of the community as due process"[27].

Later the National Labour Relation Act was upheld by the Supreme Court in a spate of decisions[29] recognizing the employees' right to collective bargaining and the need for a Labour Board to hear complaints against unfair labour practices. We thus see without recourse to any constitutional Amendment, the interpretative jurisdiction of Courts itself was utilized to recognise the growing socialistic ideology of America. A liberal construction of the constitution

25. *Ibid.* at P. 549.
26. 297 U.S.I.
27. 300 U.S. 379.
28. *Adkins* v. *Chidren Hospital* 261 U.S. S. 25; *Allegeyer* v. *Louisianne* 165 U.S. 578; *Lochner* v. *New York* 198 U.S. 45.
29. *National Labour Relations Board* v. *Jones & Laughton Steel Corporation* 301 U.S.I.; *Hammer* v. *Dagenhart* 247 U.S. 251; Schecter Poultry cases 295 U.S. 495.

followed. The court said "the cardinal principle of statutory interpretation is to uphold and not to destroy"[30]. Thus the Fair Labour Standards Act of 1938 which fixed minimum wages and maximum hours of work was upheld[31] overruling the earlier decision in *Hammer* v. *Dogenhart*[32]. The Court now said "The purpose of this legislation was plainly to make effective the congressional conception of public policy that Inter-State commerce should not be made the instrument of competition in the distribution of goods produced under sub-standard labour conditions". The coping stone of interpretative excellence was pronounced in *American Power Co.* v. *S. E. G.*[33] where it was observed..... "We affirm once more the constitutional authority resident in Congress by virtue of the commerce clause to undertake to solve national problems directly and realistically, giving recognition to the scope of State power. That follows from the fact that the Federal Commerce Power is as broad as the economic needs of the nation".

Thus we see in America without any specific insertion in the constitution any 'Directive Principles' the broad interpretation of the clauses of the constitution gave scope for measures of economic and social reform from time to time, so boldly undertaken by the Federal and State Governments. All credit is due to the role played by the Supreme Court which feared not to change its opinions if it went to further the progress of the nation as a whole. It always aimed at an enlightened view balancing fundamental rights and the social needs giving adequate scope for quick and efficient action to governmental authorities to implement such social aspirations of the people at large. All this was accomplished without any restatement of rights in the constitution in the light of altered conditions from time to time. The basic formula of the 'commerce clause', and 'Due Process' gave enough scope for adaptability to the changing social polity.

England.

In England the Parliament is the supreme law-making body and no court of justice can question Parliament's wisdom or its laws. The Magna Carta and the Bills of Rights were however conventionally accepted as incorporating the aspirations of the people. Parliament's power exercised through an administrative agency was at first interpreted strictly as in U. S. A. Later however the social needs of the people came gradually to be recognized and rules of interpretation tended towards the needs of a citizen. Thus the Housing Acts were originally strictly interpreted so rigidly that one would think that even Parliament had no power to provide for housing accommodation to the working classes. Though in theory there was nothing to prevent Parliament from passing laws depriving private property even without compensation, yet no such thing was attempted. Rules of natural justice was imposed on administrative acts to 'hear the other side' though it was merely an administrative and not a judicial act. Thus in Franklin's case[34] Henn Collins J., held that the Minister's satisfaction must be based on 'reasonable' grounds"; "Seeming fairness" was insisted and in acting quasi judicially, an 'open mind' was advocated. Parliament's words such as 'Ministers satisfaction' was interpreted by courts as 'reasonable satisfaction after due hearing'[34]. Thus in an unique way new social rights got courts' recognition through rules of interpretation which restated the law as society needed it though Parliament might have not really meant

30. 301 U.S. 1.
31. *U.S.* v. *Derty* 312 U.S. 100.
32. 247 U.S. 251.
33. 329, U.S. 90.
34. (1947) 1 All. E. R. 396.

it[35]. Thus the place of Directive Principles in English History was taken by conventions and interpretative sphere of courts of justice which always took a progressive view of matters in consonance with the social aspirations of the citizen but nevertheless in a manner which not openly flout Parliament's supreme authority but in an unostentatious and obediently subtle way, direct the Nation's progress. Though these conventions of England are unwritten, they are nevertheless recognized as effective. They have the sanction of the force of law. Dicey put it thus[36] "Constitutional understandings are admittedly not laws. They are not, that is to say, rules which will be enforced by courts..... suppose that Parliament were for more than a year not summoned for the despatch of business. This would be a course of proceedings of the most unconstitutional character. Yet there is no court in the land before which one could go with the complaint that Parliament had not been assembled". Yet the convention of Parliament being in Sessions has always been respected in England and the people of the Government have held to this convention almost as it was a mandatory law. Conventions in England take the place of Directive Principles.

Germany.

The Weimer constitution did declare many rights as Fundamental such as equality before law (Art. 109) inviolability of personal liberty (Art. 114), of house of every German (Art. 115), free expression of opinion (Art. 118), the right to association (Art. 124), the right to petition (Art. 126), etc. There were also other social economic rights stressed such as fair distribution of land and dwelling houses to be seen to by the State (Art. 155), there citizens' right of combination for the protection and promotion of labour and economic conditions (Art. 159) etc. But the defect in the Weimer constitution is that neither of the above categories of the fundamental rights and the socio economic rights were made justiciable. So it all fell flat for want of judicial protection. The classification should have allowed justiciability at least to the first category. The 2nd category comes within the caption of Directive Principles of State Policy.

Ireland.

Here we have the enunciation of 'Directive Principles of Social Policy'. The civil and political liberties that came under the caption of Fundamental Rights were alone made justiciable. In Art. 45 (of Eire) we have 'the State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of national life—such as securing all men and women citizens fair means of making through their occupation, reasonable provision for their domestic needs; that ownership and control of material resources of the community are distributed to subserve the common good etc. Private initiative in industry is to be encouraged and supplemented by the State. The State is to safeguard the economic interests of the weaker sections of the community. It has also to safeguard the health of workers, men and women and young children.

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35. Vide *Robinson* v. *Minister of Town and Country Planning* L.R. (1947) K.B. 702; *Johnson* v. *Minister of Health* (1947) All. E.R. (Vol. 2.) p. 395.
36. Dicey's Introduction to Law of Constitution 9th Edition Ch. XV P. 439. 440.

Thus Ireland is an improved version of the Weimer model, in charity, in wider range of socio economic rights and in making the fundamental rights justiciable.

In Ireland it is "Directive Principles of 'Social Policy'" while in India it is 'Directive Principles of State policy' making it incumbent on the State to adhere to and practise these Directive Principles.

Peculiarly enough Art. 45 of the Irish Constitution states that the principles 'shall not be cognizable by any court under any of the provisions of the constitution'. It is not specifically stated therein that it is not justiciable. It merely says in general terms 'the principles are intended for the general guidance of the Oireachtas'. In other words, the latter body has to apply these principles in making laws. But courts in Ireland may take cognizance of the general trend of these Directives though Legislative sanction has not been accorded to them.

In India it is not such a mere moral obligation. It is a definite binding obligation on those who govern the country and in the words of Art. 37, 'it shall be the duty of the State to apply these Principles in making Laws'.—the principles being 'fundamental in the governance of the country'. The Indian 'non-justiciable Directives' is however mainly taken from the constitution of Eire.

Article 36.—In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

Definition.

COMMENTARY

India.

Art 12 defines 'state' as 'Government and Parliament of India and the Government and the Legislature of each of the State and all Local or other authorities within the territory of India or under the control of the Government of India.' Municipal bodies also come under the definition of State[37]. Art. 12 (Part III of the Constitution) governs Part IV. Hence the Directive Principles of State Policy are as much binding all local authorities. They can and should promote cottage industries, ensure a living wage, decent standard of life, enjoyment of leisure for workers etc. prohibit consumption of intoxicants etc.

Jammu & Kashmir.

Part IV of the Constitution is not applicable to Jammu and Kashmir. The latter has acceded to the Indian Republic and the Indian Parliament has only power in the field of finance, defence and justice. The Supreme Court has jurisdiction over the judicial administration in the States under reference. But in the field of Fundamental Rights only those that are approved by the States jurisdiction his a writ to the Supreme Court of India under Art. 32. Art. 370 read with the Jammu & Kashmir Order, 1950 outlines the sphere of jurisdiction. After accession the formal Presidential order dated 16.5.1954 under Art. 370 merely reiterates the original agreement on the spheres of control by the Government of India, consequent on the Constituent Assembly of the States in question raifying the original 1952 Delhi agreement. Under the new order Parts I to III, V and

37. *Buddhu* v. *Allahabad Municipality* A.I.R. 1952 All. 753.

XI to XXII of the Constitution will be applied to Jammu and Kashmir with appropriate modification. Part IV is thus specifically omitted. While the bulk of the Union List will be applicable certain exceptions arise such as exclusive competence of the State regarding industrial and mineral development, census and company laws. The Constitution and organization of the State High Court, its power and jurisdiction are also matters within the exclusive competence of the State. The Concurrent List will not also apply. The Residuary authority vests in the State. These are the important exceptions. We note however the Supreme Court exercising same jurisdiction as in other parts of India. That is also the same in the matter of financial relationship and control by the Union Government. Thus due to various reasons historical and political Jammu and Kashmir get a special position and treatment in the Constitution of India. The Supreme Court has now by a Presidential Ordinance permitted a Bench of its court to function in Kashmir region itself for speedy expeditious disposal of cases attracting its jurisdiction. No such Bench functions in any other part of India except Hyderabad, though the Constitution specifically allows branches of the Supreme Court functioning anywhere, if duly constituted.

Judicial Interpretation.

In *Bhuddhu* v. *Allahabad Municipality* (*F.B.*)[39] the definition of 'State' came in for clarification so as to include municipalities also. The title 'Directive Principles of State policy' and the word 'State' in Art. 36, which postulates that the word 'State' in Part IV has the same meaning as in Part III of the Constitution—all these indicate the Directives apply to all organs of States. In the instant case[39], their Lordships stated, "The Directives contained in Arts. 47 and 48 apply to the Municipal Boards as much as to State Governments. The promotion and maintenance of the health of the inhabitants of a municipality including the raising of the level of nutrition is a duty cast upon the Board not only by the Municipalities Act but also by the Constitution".

In *Mangru* v. *Budge Budge Municipality*[40] the order of the Municipality closing down slaughter house with a view to increase production output of milk was held to be without jurisdiction as refusal of licence for selling in a slaughter house can only be given for reasons set out in Sec. 370 (2) of the Bengal Municipal act *e.g.*, annoyance, offence or danger to persons residing in the locality, or a legislation under Art. 48 should be there to prohibit slaughter houses. It was further held in the instant case that the existence of an alternative remedy does not operate as an absolute bar to the grant of prerogative writs under the extraordinary jurisdiction of the court. The question can be viewed from the angle if an appeal will be adequate remedy for the redress of the petitioner's grievances or a writ proceeding as in this case.

Directive Principles which enunciate the need for promotion of cottage industries, prohibition of intoxicating liquors, provision for just and humane conditions of work and maternity relief, free and compulsory education for children, promotion of the educational and economic interests of the Scheduled Castes etc. raising of level of nutrition and standard of living, organizing agricultural and animal husbandry—all these are directives meant for implementation by the local bodies as well as the State at the Centre and State level. This has to be so to foster the proper governance of the country at all levels. All local authorities, union panchayats, municipalities, district boards are but limbs or organs of the State partaking in different spheres of the governance

39. A.I.R. 1952 All. 753. 40. A.I.R. 1953, Cal. 333.

of the country. Hence it is as much unconstitutional if a local authority enacts a bye-law or passes an order which is at variance or in defiance of the Directive Principles of State Policy in Part IV or the fundamental rights as set out in Part III of the Constitution.

Application of the principles contained in this Part.

Article 37.—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

FOREIGN CONSTITUTIONS.

Burma.

Article 32 of the 1948 Constitution of Burma postulates :—

'The principles set forth in this chapter are intended for the general guidance of the State. The application of these principles in legislation and administration shall be the care of the State but shall not be enforceable in any court of law'.

Eire.

Art. 45 of the 1937 Constitution of Eire posits :—

"The Principles of Social Policy set forth in this article are intended for the general guidance of the Oireachtas. The application of these principles in the making of laws shall be the care of the Oireachtas, and shall not be cognizable by any court under any of the provisions of the Constitution".

COMMENTARY ON FOREIGN CONSTITUTION.

It will be noted that in Burma it is clearly laid down that the Directive Principles should be applied in legislation and administration and that it shall be the special care of the State to give effect to it. The Directive Principles are not intended to be enforceable in any court of Law. Similarly, in Ireland the Oireachtas shall see to the application of these principles in making laws. We believe that to the extent the Constitution lays a duty on the State to carry out these directives in the making of laws, courts are competent to question laws that run wholly counter to the Directive Principles as unconstitutional. Maybe the directives as such are not enforceable in a court of law but if a law wholly violates these Directives, and the State on whom a Statutory duty rests in seeing that there is no such violation caused, then it will be appropriate to Court, on a proper occasion to declare that the State had failed in its statutory obligation to see that these Directives are applied and that a legislation which is abhorrent to the spirit and letter of the Directives, cannot be considered as quite constitutional. Such occasions may however be rare for ordinarily if a law is abhorrent to Directive Principles it would have also transgressed some guaranteed fundamental rights. The justiciability of the latter is very clear. The Court is to see implicity to the application of fundamental right while it is the State that should attend to the application of the Directive Principles. So till the State amends the law to be in conformity with the Directives, even such apparently unconstitutional laws are valid, when they do not offend fundamental rights but only offend the Directive Principles.

India.

We have already adverted at length to the scope and efficacy of Directive Principles in the opening pages of our commentary in this Part IV of the Constitution.

Article 37, however, enjoins :—

1. The Directive Principles are fundamental in the governance of the country.
2. It shall be the duty of the State to apply these principles in making laws.
3. The provisions in this Part IV are not enforceable by any court.

These Directives formulate certain (1) economic and social ideals which the State should strike for (2) Directives to the Legislature and the executive in their future course of action (3) grant of certain rights to the the citizens akin to fundamental rights but capable of complimentation only by the Legislature and the State and not by courts as such.

It may be stated broadly that the Directives are for the making of the Laws. The word 'Governance of the Country' in Art. 37 indicate that the Legislature and the executive should recognize that these Directives are fundamental for the governance of the country and see that laws are in conformity with the same. Laws alone are binding and not so the Directives so far as courts of law are concerned. But if a Law is abhorrent to a Directive, a court may be competent to declare that this unconstitutional aspect of the particular statute should be rectified by the State in seeing that the Law is brought in conformity with the Directive Principles. So far as legislative competence is concerned it is the Legislative lists and specific articles that confer the legislative power, that should be looked into by the court. The Directive Principles cannot be considered as conferring legislative power. Though the court cannot adjudge a law as unconstitutional on the ground that it runs counter to the Directives (it can do so if it is counter to a fundamental right). Yet if the court in so many terms makes an observation that the State's duty to apply the Directives in making Laws, has been lost sight of, then it is the duty of the State to remedy the defect. It was in this fashion that Dr. Ambedkar mooted the first Constitution Amendment Bill to amend Art. 15 as to prevent Arts. 29 (2) and 16 (4) being interpreted in a way that 'put a barrier in the advancement of the weaker classes' which again was against the letter and spirit of Art. 46. Dr. Ambedkar defined the Amendment on the plea that the courts in interpreting the Fundamental Rights had lost sight of the Directives.

Judicial Interpretation.

Giving effect to the Directive Principles of State Policy should not in any way result in any negation of the Fundamental rights[41]. The Indian Constitution has not adopted any of the provisions of the Declaration of Human Rights without modification and Art. 51 is not enforceable in view of the express bar of Art[42].

41. *Sukhnanda Thakur* v. *State of Bihar* A.I.R. 1957 Pat. 617.

42. *Bisvambara Singh* v. *Orissa State* A.I.R. 1957 or 247.

We had already adverted to the decision in the *State of Madras* v. *Champakam Dorai Rajan*[43] that the Chapter on Fundamental Rights is sacrosanct while Part IV is only subsidiary to Part III of the Constitution and "that so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the State under different provisions of the Constitution". The dissenting view of Somasundaram J., in Madras[44] found support in *Om Prakash* v. *State of Punjab*[45] to the effect that Art. 46 may be taken as an exception to Art. 29 (2). But this view is untenable in view of the Supreme Court decision in Champakam's case to the effect that there can never be any action taken by the State in derogation of Fundamental Rights guaranteed under Part III of the Constitution nor even as against the specific provision of any other article in the Constitution.

The Bombay High Court held a similar view in *Fram Nuserwanji Balsara* v. *State of Bombay* [46] where Chagla J., opined "Article 37 of the Constitution provides that the 'Directive Principles are fundamental in the governance of the country' but are not enforceable by any court. They are in the nature of Instrument of Instructions which both the legislature and the executive are expected to respect and to follow, but they do not confer any legislative competence on a legislature in respect of any matter over which it has no competence".

The question arises whether Art. 37 is merely directory. It is more than that. It is fundamental for the governance of the State. Suppose a law runs counter to the Directive Principles such as scrapping of prohibition law or discouraging village panchayats. These two are contrary to Arts. 47 and 40 respectively. The validity of such a law apart, the State of which the President or the Governor, as the case may be, is the titular head should not have allowed such a legislation. There is the veto power of the President. Withholding of assent may bring back the Bill for legislative consideration. But despite these safegurards if such a law was passed, it appears to us that the courts will be at perfect liberty to observe in their judgments, that the State had ignored principles which are essential for the governance of the country and that the court is powerless to declare such a law invalid on account of the specific injunction in Art. 37 that Part IV is not enforceable by any court[47]. It is then for the State to take the initiative to amend the Law to be in consonance with the Directive Principles. Ultimately it is the people who should ask the cabinet in office to answer at the public forum as to why the govnance of the State has not been carried on in accordance with the Directive Principles. Democracy can function only this wise. If public opinion wants a change even in the Directive Principles, then it is for Parliament to amend the Constitution in accordance with the procedure laid down for the same.

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43. 1951 S.C. 226; 1951 S.C.R. 525.
44. A.I.R. 1951 Mad. 120.
45. A.I.R. 1951 Punj. 93.
46. A.I.R. 1951 Bom. 210: I.L.R. (1951) Bom. 17. (The point raised is unaffected in the appeal Judgment A.I.R. 1951 S.C. 3.
47. Vide Chitaley's Constitution of India p. 836 and Article in (1953) 1 M.L.J. (Journal) 9. *See* also *In re* M. Thomas A.I.R. 1953 Mad. 21 (Articles 46 and 37).

There are, however, definite uses to which Directive Principles may be put to. They are :—

1. When there is doubt or ambiguity in the construction or meaning of any provision of the Constitution a reference to Directive Principles may be helpful. Any construction which is in accord with the Directive Principle is to be favoured.

   This is analogous to reference to the Preamble of a Constitution in interpreting a provision of the Constitution.

2. To understand the scheme of the Constitution in a particular provision of the Constitution, Directive Principle may be a good aid. Directive Principles afford in fact the scheme of the Constitution in a nut-shell.

3. Reasonableness of a restriction on the Fundamental Right may be guaged by a reference to Directive Principles.

   Thus in *State of Bombay* v. *P. N. Balsara*[48] the reasonableness of the provisions of a Prohibition Law under Art. 19 was considered in the light of Art. 47.

4. As to whether a certain matter is for public benefit (*vide* Art. 19) a reference to the Directive Principles is most helpful. Such a public purpose was pointed by a reference to Art. 39 in *State of Bihar* v. *Kameshwar Singh*[49] for upholding a Zamindari abolition statute within the ambit of Art. 31. Any Law which aims at the implementation of a Directive Principle is deemed a public purpose.

Mangru v. *Budge Budge Municipality*[50] denotes that though Art. 48 directs prohibition of slaughter of cows and calves, yet in so far as there was the Municipal Act permitting licences for such slaughter houses, order closing the staughter house was held incompetent. Maybe a Directive Principle is disobeyed but then a court has to protect the citizen only against a violation of a fundamental right and not a mere violation of a Directive Principle. It is for the State to implement legislation on the basis and tenor of Directive Principles. A Law running counter to Directive Principle can therefore be valid though a law antagonising a Fundamental Right is invalid. In the Calcutta case in appeal[51] it was, however, held that it is discretionary with the municipality to maintain a slaughter house and that no one has a right to insist that they must maintain a slaughter house in order to supply him with meat for the purpose of his trade. No writ or direction will therefore lie for the enforcement of a statutory right unless it appears that the statute in question imposes a duty and does not merely vest a discretion. The resolution of the municipality to close down the slaughter house cannot be defeated by a writ, as the resolution appears to be in perfect accord with the Directive Principle in Art. 48.

In *Buddhu* v. *Municipal Board, Allahabad*[52] Art. 47 was invoked as it enjoined the State (which includes all organs of State such as Municipal Boards etc.) to raise the level of nutrition and standard of living of the people. The Municipal Board towards this end prohibited slaughter of cows etc. to enable greater supply of milk to the people. The argument that the personal right

48. A.I.R. 1951 S.C. 318: 1951 S.C.R. 682.
49. A.I.R. 1952 S.C. 252 *See* also *Suryapal Singh* v. *U. P. Govt.* A.I.R. 1951 All. 674; I.L.R. (1952) 2 All. 46 (F.B.).
50. A.I.R. 1953 Cal. 333.
51. A.I.R. 1953 Cal. 433. (F.B.).
52. A.I.R. 1953 All. 753.

to carry on any trade as per Art. 19 (1) G. was met by the principle of reasonable restriction under Art. 19 (6), Art. 47 was a sufficient criterion and test for the reasonableness of the restrictions.

As we stated earlier, a law running counter to Directive Principles may be stopped by the President by withholding his consent under Art. 111. Under the old Government of India Act 1935, Sec. 68 (2) specifically provided that a 'Bill passed by both chambers of Indian legislature shall not become an Act until the Governor-General has declared his assent thereto". But Art. 111 has no such provision. But the proviso in Art. 111 indicates that the President can remit the Bill for reconsideration of the Houses of Parliament and if the latter again pass the Bill, it is constitutionally obligatory for the President to give his assent.

State to secure a social order for the promotion of welfare of the people.

Article 38.—The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

FOREIGN CONSTITUTIONS.

Eire.

Art. 45 cl. (1) of the 1937 Constitution posits :

"The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which Justice and charity shall inform all the institutions of the national life".

COMMENTARY

India.

It will be seen that Art. 38 is modelled mainly on the Irish model except that securing and protecting [as effectively as it may a social order in which] Justice and The former two categories may be said to connote the Irish term 'Charity' also.

The Preamble of our Constitution already secures to the citizen justice, social, economic and political. Hence Art. 38 is but a reaffirmation and elaboration of the same as a State Policy of Directive Principle. This article emphasises the promotion of public welfare as a cardinal doctrine of the State. This is to be achieved by securing and protecting a social order which is based on social justice, economic justice and political justice. These shall be the criteria for all institutions of national life. The welfare State ushered in, promoted and fostered this wise is to be the haven for the common man in the Democratic Sovereign Republic of India. Art. 38 is general in its terms while Articles 39 to 47 detail as to how this welfare of the people is to be promoted. Political as well as economic democracy is the goal set out in this article. But it must be remembered these are only Directives. Now justiciability, the effect of the word 'strive' in the article, the discretionary letter 'as it may' all reduce the programme as a mere programme with no real sanction or compelling force. But then, Art. 36 sets out that all Directive Principles are fundamental in the governance of the country and that the State shall apply them in the legislative and executive spheres.

The price of Democracy is also the negation of it rendered by the silence of a lethargic public. It is up to the people to create the sanction at the poll

and demand of the Ministry the fulfilment of the programme as set out in Part IV.

Certain principles of policy to be followed by the State.

Article 39.—The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(d) that there is equal pay for equal work for both men and women ;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

FOREIGN CONSTITUTION.

U.S.S.R.

Art. 122 of the 1936 Soviet Constitution postulates :

'Women in the U. S. S. R. are accorded equal rights with men in all spheres of economic, State, cultural, social and political life. The possibility of exercising these rights is ensured to women by granting them an equal right with men to work, payment for work, rest and leisure, social insurance and education and by State protection of the interests of the mother and child, pre-maternity and maternity leave with full pay, and the provision of a wide network of maternity homes, nurseries and kindergartens".

Art. 118 posits :—

Citizens of U. S. S. R. have the right to work, that is the right to guaranteed employment and payment for their work in accordance with its quantity and quality.

The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment.

Art. 120 provides :—

"Citizens of the U.S.S.R. have the right to maintenance in old age and also in case of sickness or disability.

"This right is ensured by the extensive development of social insurance of factory and office workers at State expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people".

Burma.

Art. 37 (1) of the 1948 Constitution provides :—

'The State shall ensure that the strength and health of workers and the tender age of children shall not be abused and that they shall not be forced by economic necessity to take up occupations unsuited to their sex, age and strength'.

Eire.

Article 45 cls. (2)—(4) of the 1937 Constitution posits :—

2. The State shall, in particular, direct its policy towards securing

(i) that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs ;

(ii) that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good ;

(iii) that, especially the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals, to the common detriment ;

3. (i) the State shall favour and where necessary supplement private initiative in industry and commerce.

(ii) The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.

4. (ii) The State shall endeavour to secure that the strength, health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength ".

Rumania.

Section 19 of the 1948 Constitution of the Republic states :—

'All citizens have the right to work. The State gradually secures the full exercise of this right by the planned organization and development of national economy.'

Section 21 posits :

'Women have equal rights with men in all domains of State, economic, social, cultural and political life and in private law.'

For equal work, women are entitled to remuneration equal to that of men.

Sec. 25 states :

'The State safeguards public health by establishing and developing health services and by encouraging and assisting public training.'

Sec. 26 says :

The mother and children up to the age of 18 years shall enjoy special protection, prescribed by law.

Czechoslovakia.

Sec. 1 (2) of the 1948 Constitution states :

Men and women have equal status in the family and in the community and equal access to education and to all callings, offices and dignities.

Sec. 26.

1. All citizens possess the right to work.
2. This right is secured, in particular by the organization of work directed by the State in accordance with a system of planned economy.
3. Women are entitled in respect of pregnancy, maternity and child care to special treatment as regards their conditions of employment.
4. The Law shall prescribe special conditions of employment as regards young persons, having regard to the requirements of their physical and mental development.

Sec. 27.

1. All working members of the population possess the right to just remuneration for the work done.
2. In equal conditions men and women are entitled to equal remuneration for equal work.

Sec. 146.

The means of production are either national property or the property of the popular co-operatives or in the private ownership of individual produce.

Section 162.

By means of a unified economic plan, the State directs all economic activity (in particular, production, trade and transportation) so as to ensure an adequate level of national consumption, to increase the quantity, quality and flow of production and gradually raise the standard of living of the population.

Costa Rica.

In the 1949 Constitution of the Republic.

Section 50 posits :

The State shall endeavour to procure the greatest well-being of all the inhabitants of the country, by organizing and promoting production and the most appropriate distribution of wealth.

Section 51.

Mothers, children, the aged and helpless invalids shall likewise be entitled to this protection.

Section 56.

Work is the right of the individual and an obligation towards society. The State must ensure that all have an honest and useful occupation which is properly paid, and must prevent such occupation from giving rise to conditions

which in any way impair the liberty or dignity of the individual or reduce labour to the level of a mere commodity.

U. N. A.

Art. 21 (2) of the United Nations Declaration of Human Rights postulates " Every one has the right to equal pay for equal work ".

France.

The preamble to 1946 Constitution of the Fourth French Republic Postulates :

' The Law guarantees to women equal rights with men in all dominions '.

COMMENTARY

Art. 39 is in a way the operative portion of the objectives set out in Article 38. The right to work, equal treament to women, health protection to workers and a just economic system in Society have all found their recognition in the constitutions of advanced countries. We had noted how foreign constitutions of Eire, Burma, U. S. S. R., France, Czechoslovakia, Rumania, Costa Rica etc., have their own provisions to carry out in some measure the above objectives. The system in each country varies as also the method of approach according to the political and economic structure of each country.

It may be noted that in Article 39 the welfare of workers is stipulated in clauses (a), (d), (e) and (f) while clauses (b) and (c) appertain to distribution of wealth. The former category of welfare of workers is again stressed in Articles 41, 42 and 43. Art. 41 stresses on the State to help in the securing of work, education and public assistance in cases of unemployment, old age, sickness, disablement etc. Art. 42 secures just and humane conditions of work and for maternity relief. Art. 43 enjoins on the State to get for the worker living wage, good conditions of work assuring a decent standard of life, leisure, social and cultural opportunities etc. Art. 39 (a) refers to equal right to an adequate means of livelihood for both men and women. Art. 39 (d) assures equal pay for men and women while Art. 39 (f) protects childhood and youth from exploitation and against moral and material abandonment. While Art. 39 (e) ensures health protection to the workers, Art. 47 again aims at raising the level of nutrition and standard of living of the common man.

The ideal of distribution of wealth as adumbrated in clauses (b) and (c) of Art. 39 merely is another plank to improve the lot of the worker. The avoidance of concentration of wealth or of material resources in the hands of a few people leads to the economic betterment of the worker. So far as the State operating the economic system to avoid concentration of wealth and means of production, in a welfare state the trend appears to be towards nationalization of the important industries. Private enterprise in means of production, is not taboo. On the other hand, private enterprise has to be encouraged to speed up initiative in production. Only there must be no monopolistic trend as to affect the common good. Hence it is that the Directive in Art. 39 (c) is to emphasise on prevention of concentration of wealth and means of production. Private ownership is recognized but not too much of it when it is to the detriment of the common good preventing the workers from having a liberal share in the nation's wealth. This is more clearly specified in clause (b) of Art. 39 where it is postulated that ownership and control of material resources of the community are so distributed as best to subserve the common good.

The programme chalked out in clauses (b) and (c) are not of easy solution. They have to be tackled gradually but firmly by the State in stages as and when conditions permit it or necessitate it. The various Labour Legislations on the increase in our land are the result of these Directives. But much has to be achieved in controlling means of production and concentration of wealth. As this has to be achieved in a constitutional way without the hazards of a sudden revolution, the rate of progress is bound to be rather slow in this direction. Nationalization in key industries will help the problem very much.

As examples for Art. 39 (b) and (c) we may cite the Zamindari Abolition Acts. Thus in *State of Bihar* v. *Kameshwar Singh*[53] these clauses were invoked to support the public purpose needed for the enactment under Art. 31. Mahajan J., posited, "It is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible".

A similar legislation of Madhya Bharat relating to Jagirs was upheld in *Raj Rajendra Maloji Rao* v. *State of Madhya Bharat*[54], on the same principle as set out by the Supreme Court in Kameshwar Singh's case[53].

Citizens.

The definition of 'citizen' is given in Art. 5 of the Constitution[55]. Both men and women come under the clause of 'citizen' but a 'corporation' cannot be deemed to be a citizen within the meaning of cl. (a) of Art. 39. A perusal of Arts. 5, 6, 8, 9 and 39 makes it clear that a corporation cannot be a citizen within the meaning of Art. 19 also[56].

In view of Articles 38 and 39 it is now idle to contend that trade or business is not a legitimate function of the State or that it departs preposterously from its sovereign function when it indulges in such activities[57]. No legislative sanction is now necessary, (in view of Articles 38, 39, 289, 19, 298) to start or run the business of plying motor vehicles for hire[57].

In America women were singled out for special treatment in the exercise of State's Protective Power without violating the Fourteenth Amendment. Reversing an earlier decision the U.S. Supreme Court upheld[57a] a minimum wage law for women in 1937 saying that their unequal bargaining power justified a law applicable only to them.

In India while Art. 39 enjoins equality of treatment to women [Art. 39 clause (d)], special treatments to women are envisaged in clause (e) of Art. 39 and clause (3) of Art. 15.

In Art. 39 cl. (d) equal pay is enjoined for both men and women. The phrase 'both men and women' must be taken in an all embracing aspect. What is connoted is that equal pay should exist between man and man, man and woman, and women and women, for equal work shown. Otherwise, the equality

53. A.I.R. 1952 S.C. 252: 1952 S.C.R. 889: I.L.R. 31 Pat. 565 (S.C.).
54. A.I.R. 1953 Madh. B. 97.
55. *Vide* also Art. 19 Commentary.
56. *The Jupiter General Insurance Co., Ltd.* v. *Rajagopalan* A.I.R. 1952 Punj, 9.
57. *The Peoples Bus Services Ltd.* v. *The State*, A.I.R. 1956 Pepsu 3.
57a. *Goesaert* v. *Bleary* 335 U.S. 465.

principle in Art. 14 would get offended. There may be a nice question as to when two men do the same work but are in different cadres of pay, will it offend the equality clause? Unless there is a special aptitude and extra power recognised and vested in an official, any other officer doing the same work can question the inequality in pay. Seniority, supervising power, special extra power, different nature of work are all criteria which can give an official a rightful claim for a higher pay. But if none of these exist mere cadre cannot be proper for giving higher pay.

Organisation of village panchayats.

Article 40.—The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

COMMENTARY.

The reintroduction of Panchayat Raj in rural India as in ancient times is the ambition of the early patriots of Freedom struggle. This article was not present in the original draft constitution but some enthusiasts were too keen to have such a provision in the final drafting of any constitution. There can be no gainsaying that this is a very controversial question. We feel it is also a difficult question and we need not make a fetish of this panchayat idea. Ancient village communities were simple, life was simple and the elders of the village always commanded respect to make the village Panchayat real and effective. Now modern civilization has disturbed the calmness and goodness of village life. Life is complex, varied and often leads to petty and even serious rivalries even at village level. The village elder is a bygone affair and no village takes the other as his senior. Faction following the wake of economic ruin, exploitation of the weak by the strong, petty jealousies and rival feuds have all shattered the serenity of a village life. To visualize therefore the glory of a resuscitated village panchayat as the acme of perfection as units of self-government is likely to be only a delusion.

To entrust judicial or police power to these panchayats is hazardous. Recent experiences have indicated that there is more abuse of power in these panchayats which generally get manned by undesirables who alone can browbeat the villagers in electing them. The better men also are either few or recede from all public life. In one case[58] a Madras Judge observed, "This case is a good instance to show that in this country the panchayat courts ought not to be invested with criminal jurisdiction. They seem to be carried away by the local politics and the enmical feelings that they happen to entertain against persons."

Want of education, and poverty are some of the reasons as to why villagers are exploited by scheming men of the locality making it really impossible for any panchayat to work. The latter day tendency to invest these panchayats with more powers is disastrous. There is nothing undemocratic in waiting till there is an all round emancipation of villagers in the field of education, higher standards of living and better civic conscience. The haste for decentralization of power is more too good in India, where it is better to be the other way. A strong centre is the bulwark for Indian Democracy, lest fissiparous and parochial element in a State pull down the grand republican edifice. Similarly, also concentration of power at State level is more important than to dilute it by decentralization at the lowest level as the village panchayat. We may say panchayat

58. Samasundaram J., in *Venkatachala Naicker* v. *Punchayat Board*, A.I.R. 1953 Mad. 388.

justice cannot regain its old purity. Law is more complex and so also is the man in the village. To vest judicial power, at any rate too much of it at village level, is indeed hazardous to the fair name of judicial administration. Concentration of police power in the village panchayat also will wrench village life as it is sure to be abused to vitiate private animosities. To entrust revenue collection to the panchayats (we understand there is a move to consider the matter) is most hazardous and will only deplete the public exchequer by breach of trust indulged in by those that get into these panchayats. The test of time had shown that the Revenue department is best entrusted with collections due to the Government.

We cannot help stating the above despite the Directive in Article 40 to organize village panchayat. At any rate, any authority vested with these panchayats must be given after long experimentation. Art. 40 also merely states the power must be just commensurate to make them function as units of self-government. The State will do well to place certain essential conditions for these panchayats to entitle them to ask for being clothed with more powers.

India has outgrown its villages and no more can we replant village self-government. Modern Society trends have to be recognized and it is betimes that efficiency, justice and economy is not sacrificed at the altar of the so-called village autonomy.

Legislative power.

List II of the Seventh Schedule demarcates Entry 5 as the relevant legislative power.

Right to work, to education and to public assistance in certain cases.

Article 41.—The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

FOREIGN CONSTITUTIONS.

U.S.S.R.

Arts. 118, 120 and 121 of the 1936 Soviet Constitutions run as follows :

Art. 118.

Citizens of the U.S.S.R. have the right to work, that is, are guaranteed the right to employment and payment for their work in accordance with its quantity and quality. The right to work is ensured by the socialist organization of the national economy, the steady growth of productive forces of Soviet Society, the elimination of the possibility of economic crises, the abolition of unemployment.

Art. 120.

Citizens of the U.S.S.R. have the right to maintenance in old age and also in case of sickness or loss of capacity to work. This right is ensured by the expensive development of social insurance of workers and employees at State expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people.

Art. 121.

Citizens of the U.S.S.R. have the right to education.

This right is ensured by universal compulsory elementary education; by education including higher education, being free of charge; by the system of State stipends for the overwhelming majority of students in the universities and colleges, by instruction in schools being conducted in the native language and by the organization in the factories, state farms, machine and tractor stations and collective farms of free vocational, technical and agronomic training for the working people.

Burma.

Art. 33 of the Constitution stipulates :

The State shall direct its policy towards securing to each citizen— (1) the right to work; (2) the right to maintenance in old age and sickness or loss of capacity to work; (3) the right to rest and leisure, and (4) the right to education.

Art. 40 further states :

The State shall ensure disabled ex-servicemen a decent living and free occupational training. The children of fallen soldiers and children orphaned by war shall be under the special care of the State.

France.

The preamble to the 1946 Constitution of the Fourth French Republic says :

"Everyone has the duty to work and the right to obtain employment ..... Every human being, who because of his age, his physical or mental condition or because of the economic situation, finds himself unable to work, has the right to obtain from the community the means to lead a decent existence..... The nation guarantees equal access of children and adults to education, professional training and culture....."

COMMENTARY.

This article makes it obligatory to the State to make effective provision for securing the right to work, to education and public assistance in case of unemployment, old age, sickness, disablement etc. This has to be carried out by the State to the extent its economic capacity allows. The right to work finds an echo in Art. 39 cl. (a) and Art. 43. Art. 45 stresses the right to education by affording free and compulsory education for children below fourteen years of age. Provision for relief in cases of undeserved want found in this article is a feature of all modern States. Advanced countries like America had made much progress in this regard. But India is not rich enough to speed up this part of social welfare.

The Employee's State Insurance Act XXIV of 1948 and the Workmen's Compensation Act (VII of 1923) give adequate relief to the employees and workmen in case of sickness, maternity, employment injury etc. Vide Entries 22 and 24 of the List III of the Seventh Schedule.

Art. 41 refers to a directive or behest given to the Government to see that in a Welfare State there shall be no undeserved want or unemployment[59]. The Directive Principles contained in Art. 41 can have no application in the decision

59. *Radhakrishna Mills, Ltd.* v. *Special Tribunal Madras,* 1954 (1) M.L.J. 266: A.I.R. 1954 M. 686.

of a dispute between workers and employers. It is a general direction or behest which the framers of the Constitution have given to the succeeding Governments to see in the Welfare State what is contemplated by the Constitution there shall be no undeserved want or unemployment. It may be that under certain circumstances there is a duty or liability cast upon the State Government to find work for all persons in the State. But we have not yet reached such a happy state of existence[59].

Provision for just and humane conditions of work and maternity relief.

Article 42.—The State shall make provision for securing just and humane conditions of work and for maternity relief.

FOREIGN CONSTITUTIONS.

Burma.

Art. 37 of the 1948 Constitution states :

"The State shall specially direct its policy towards protecting the interests of nursing mothers and infants by establishing maternity and infant welfare centres, children's homes and day nurseries and towards securing to mothers in employment the right to leave with pay before and after child birth".

U.S.S.R.

Art. 122 of the Soviet Constitution posits :

Women in the U.S.S.R. are accorded equal rights with men in all spheres of economic, government, cultural, political and other public activity.

The possibilities of exercising these rights is ensured by women being accorded an equal right with men to work, payment for work, rest and leisure, social insurance and education and by State protection of the interests of mother and child, State aid to mothers of large families and unmarried mothers, maternity leave with full pay, and the provision of a wide network of maternity homes, nurseries and kindergartens.

COMMENTARY

We have seen in Art. 39 cl. (e) a directive towards securing the health and strength of workers, men and women, and the tender age of children are not abused and that avocation suitable to one's strength alone is given. Again Art. 39 (f) protects youth and childhood against exploitation and against moral and material abandonment. Art. 43 assures higher standard of living. In all these articles the State is asked 'to endeavour'. But in Art. 42 the language is mandatory in asking the State to 'make' provisions for securing just and humane conditions of work and for maternity relief. The importance of the subject has evoked such a language. The State's fundamental duty is therefore to fulfil the Directive so mandatorily given in this article.

The Factories Act LXIII of 1948 has provisions compelling such just and humane conditions of work and for maternity relief etc.

Living wage, etc., for workers.

Article 43.—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

FOREIGN CONSTITUTIONS.

U.S.S.R.

Art. 119 of the 1936 Constitution states :

Citizens of the U.S.S.R. have the right to rest and leisure. The right to rest and leisure is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers, the institutions of annual vacations with full pay for workers and employees and the provision of a wide network of sanatoria, rest homes and clubs for the accommodation of the working people.

Burma.

Arts. 41-42 of the 1948 Constitution postulate :

Art. 41. The economic life of the union shall be planned with the aim of increasing the public wealth, of improving the material conditions of the people and raising their cultural level, of consolidating the independence of the union and strengthening the defensive capacity.

Art. 42. The State shall direct its policy towards giving material assistance to economic organizations not working for private profit. Preference shall be given to co-operative and similar co-operative organizations.

France.

The preamble to the 1946 Constitution of the Fourth French Republic posits :—

'The nation ensures to the individual and the family the conditions necessary to their development. It guarantees to all and notably to the child, the mother and the aged worker, protection of health, material, security and leisure.'

Rumania.

Section 12 of the 1948 Constitution of the Republic says :

Work is the fundamental factor in the economic life of the State. It is an obligation lying upon every citizen. The State assists all working people, to protect them from exploitation and raise their standard of living.

Section 20 states :

All citizens have the right to leisure. The right to leisure is secured by regulation of the hours of work, by means of holidays with pay in accordance with the law, by the provision of rest houses, sanatoria, clubs, parks, sports grounds and institutions specially arranged for the purpose.

CZECHOSLOVAKIA.

The 1948 Constitution states in—

Sec. 26.

(1) All citizens possess the right to work.

(2) This right is secured in particular by the organization of work directed by the State in accordance with a system of planned economy.

(3) Women are entitled in respect of pregnancy, maternity and child care, to special treatment as regards their conditions of employment.

(4) The Law shall prescribe special conditions of employment as regards young persons having regard to the requirements of their physical and mental development.

Sec. 27.

(1) All working members of the population possess the right to just remuneration for the work done.

(2) The right is secured by the State Wages Policy which is administered in agreement with the United union organization and directed towards the constant raising of the standard of living of the working population.

(3) Remuneration shall be governed by the quality and quantity of the work and by the benefit which it brings to the community.

(4) In equal conditions, men and women are entitled to equal remuneration for equal work.

Sec. 28.

(1) All working members of the population possess the right to leisure.

(2) This right is secured by statutory regulation of hours of work by means of holidays with pay and by provision of recreational facilities for the working population.

Sec. 29.

(4) The protection of life and health at work is secured in particular by State supervision and regulations for safety precautions in work places.

Germany.

The Constitution of German Democratic Republic (1949) has in :—

Sec. 15.

(1) Labour is protected by the State.

(2) The right to work is guaranteed. The State assures every citizen of work and livelihood by direction of the economy. Where the citizen cannot be referred to suitable employment, provision is made for his needs in respect of maintenance.

Sec. 16.

(1) Every working person has a right to rest, to paid annual leave, to assistance during sickness and old age.

Sec. 18.

(2) The conditions of employment must be such as to safeguard the health, cultural claims and family life of the working population.

(3) The remuneration for work must correspond to the results and secure a decent level of existence for the workers and their dependents.

Costa Rica.

The 1947 Constitution of the Republic declares in :—

Sec. 57.

Every worker shall be entitled to a minimum wage (fixed periodically) for the normal working day, such as to assure his well being and a decent mode of

existence. Equal wages shall in every case be paid for equal work, where conditions as regards efficiency are identical.

All matters respecting the fixing of minimum wages shall be dealt with by a technical body appointed by the law.

The ordinary hours for day work shall not exceed eight in the day and 48 in the week. The ordinary hours for night work shall not exceed six in the day and 36 in the week. The remuneration for overtime shall be 50 per cent. more than the stipulated salary or wage, provided that the foregoing provisions shall not apply in certain clearly defined exceptional cases to be determined by the law.

U. N. A.

The United Nations Declaration of Human Rights postulates thus :

Sec. 21.

(1) Every one has the right to work, to just and favourable conditions of work and pay and to protection against unemployment.

Sec. 22.

(1) Everyone has the right to a standard of living, including food, clothing, housing and medical care and to social services adequate for the health and well-being of himself and his family and security in the event of the unemployment, sickness, disability, old age or other lack of livelihood in circumstances beyond control.

(2) Mother and child have the right to special care and assistance.

Sec. 23.

(1) Everyone has the right to education.

Sec. 24.

(1) Everyone has the right to rest and leisure.

Sec. 25.

(1) Everyone has the right to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement .

COMMENTARY.

This Article 43 of the Indian Constitution read in tune with corresponding and analogous provisions of the foreign constitutions set out above, indicate how the world is progressing towards an ideal welfare State assuring the common man, the worker, agriculturist, industrial or artisan, a fair and minimum wage, a decent standard of living, his adequate leisure, social and cultural amenities and protection against unemployment, sickness, old age etc. It may be said that while political democracy may mean one man one vote, economic democracy postulates one man one value. But the right to work cast also a duty to work in a welfare State taking us to the Gita doctrine that ' he who are without sacrifice, without work is a thief '. There must be no such condition in society as visualized by Bernard Shaw which would produce at one end men with appetite but no dinners and at another men with dinners but with no appetite. All this can be assured only when the State endeavours to aim and work ceaselessly in producing conditions in society and in the nation's economy which would guarantee a comfortable living for every man and woman who is prepared to work. It must be understood that the right to work alone is guaranteed as also the guarantee of securing employment in all civilized countries. The

right to indolence and laziness is nowhere tolerated and in a welfare State such a condition is disastrous and the citizen must be in a way 'driven to work' to increase production. The citizen thereby helps himself and the State. No doubt, he is entitled to work, as an honourable gentleman and not as a slave. He is entitled to fair wage, leisure and all other amenities which will only spur him to further work for the betterment of the common weal.

Art. 43 has already its echo in Arts. 39, 41 and 42. There is a further rider in Art. 43 that the State shall endeavour to promote cottage industries on individual or co-operative basis in rural areas. It has to be understood that India is a vast agricultural country. Rural India is thus very important and the economy of rural parts can be made self-sufficient only by the encouragement of cottage industries which will give adequate employment and remuneration to all rural workers, who otherwise will not only lapse into purposeless lethargy in the off-seasons but also will be greatly hit in their economy. The prior articles appear to be suited for urban areas and industrial concerns while Art. 43 is general applying to all classes of workers industrial, agricultural, artisan, independent or in groups.

The development of cottage industries on a co-operative basis is very healthy. In Denmark which is predominantly an agricultural country, it has been quite a success with its co-operative societies for egg selling, poultry farming, milk supply, butter supply, etc. We can add in India the categories of Ghee supply, seeds supply, manure supply, jaggery selling, sugar selling etc.

In India we have the Minimum Wages Act (XI of 1948) which assures by legislation minimum rates of wages in certain employments, such as road construction, agriculture, public motor transport, mills etc. The normal working hours for a day are also fixed by regulation. Wide the Payment of Wages Act (IV of 1936), The Factories Act (LXIII of 1948). The relevant legislative entry is Entry 24 of List III 7th Schedule the following existing laws have been tabulated to accord with Art. 43 :—

Central Laws :—

Workmen's Compensation Act (VII of 1923).
Local Authorities Pension and Gratuities Act (1 of 1919).
Provident Funds Act (XIX of 1925).
Payment of Wages Act (IV of 1936).
Employees Liability Act (XXIV of 1938).
Employment of Children Act (XXIV of 1938).
Mines Maternity Benefit Act (XIX of 1941).
Mica Mines Labour Welfare Fund Act (XXII of 1946).
Coal Mines Labour Welfare Act (XXXVII of 1947).
Coal Mines Provident Fund and Bonus Schemes Act (XLVI of 1948).
Minimum Wages Act (XI of 1948).
Children Pledging of Labour Act (1 of 1933).
Indian Dock Labourers Act (XIX of 1934).
Plantations Labour Act (LXIX of 1951).

Entry 24 represents welfare of labour including conditions of work, provident funds, employees liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

Entry 23 deals with social security and social insurance, employment and unemployment. [*vide* Employees' State Insurance Act XXXIV of 1948 and Dock Workers (Regulation of Employment) Act (IX of 1948)]. Labour Legislation is a concurrent subject and therefore such legislation will apply to all labour whether under the control of the Union or the States. Railways are included. In Canada the anomaly is that the provinces have no right to legislate in respect of the employees of Dominion Railways.

The Regulation of hours of employment come within the scope of Entry 24.

In *Sashibhusan* v. *Mangla* [60], Article 43 was canvassed to sustain the impugned Orissa Tenancy Act 3 of 1948. The restrictions imposed in Secs. 4 and 6 of the Act were considered reasonable as being in conformity with the Directive Principles set out in Art. 43.

To ensure a living wage is the province of the State and not the courts to enforce[61].

Living wage is a directive for the State to obtain for the citizen and not for the courts to enforce[62].

Discussing the scope of Articles 43 and 47, the Calcutta High Court held[61] that what the Industrial Tribunals are supposed to do is to ensure 'industrial harmony'. They do not order living wages to be paid because the Constitution directs it, but because it must be done to avoid industrial discord. The attempt of the tribunals was to give effect to the Directive Principles but doing something in order to ensure industrial harmony, which is the object of the statutes dealing with industrial disputes.

In *Express Newspapers, Ltd.* v. *Union of India*[62] the threefold classification of wages (1) the living wage, (2) the fair wage and (3) the minimum wage was pinpointed and explained. The 'living wage' should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter, but a measure of frugal comfort including education for the children, protection against ill health, requirements of essential social deeds and a measure of insurance against the more important misfortunes including old age. This is the ideal to which a social welfare state has to approximate in an attempt to ameliorate the living condition of the workers. Their Lordships added[62] "most employers and some Provincial Governments consider that the minimum wage can at present be only a bare subsistance wage. But according to the concept of 'minimum wage' adopted by the Committee on Fair Wages, a minimum wage must provide not merely for the bare maintenance of life but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide for some measure of education, medical requirements and amenities. There is also a distinction between a bare subsistence or minimum wage and a statutory minimum wage. The former is a wage which would be sufficient to cover the bare physical needs of a worker and his family, that is, a rate which has got to be paid to the worker irrespective of the capacity of the industry to pay. If an industry is unable to pay to its workmen at least a bare minimum it has no right to exist. The statutory minimum wage however is the minimum, which is prescribed by the statute and it may be higher than the bare subsistence or minimum wage, providing for some

60. A.I.R. 1953 Orissa 171 at 177.
61. *National Carbon, Co., Ltd.*, v. *M. N. Gaur*, A.I.R. 1957 Cal. 500.
62. A.I.R. 1958 S.C. 578.

measure of education, medical requirements and amenities. The 'fair wage' is a mean between the living wage and the minimum wage. This concept of minimum wage is in harmony with the advance of thought in all civilized countries and approximates to the statutory minimum wage which the State should strive to achieve having regard to the Directive Principles of State Policy, as adopted in Art. 43 of the Constitution".

The context of the expressions 'minimum wage' 'fair wage' and 'living wage' is not fixed and static. It varies and is bound to vary from time to time. With the growth and development of national economy living standards would improve and so would the notions about the respective categories of wages expand and more progressive[62].

Uniform civil code for the citizens.

Article 44.—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

COMMENTARY.

The present article is the result of a great yearning on the part of our Constituent Assembly members to unify India, on the basis never before attempted, transcending the grand days of Asoka, or Akbar. They visualize the same pattern of life ideal and conduct throughout this vast continent of India. The unity of India had been preserved from time immemorial. It was emphasised by that great spiritual Giant Adi-Sankaracharya who travelled the entire length and breadth of India in a lightning fashion, unifying the people and their faiths (the six true paths—'Shanmatha Sthapana'). India through ages of history stands unparalleled in its essential unity at its base though diverse in appearance. Through all the multitudinous varieties of Indian life there is a strong central fibre running through, emphasising its ancient culture and heritage as one—namely Indian. It is even urged that the apparent diversity is no diversity but only an emphasis and a specialization of one or the other aspect in the personal life of the citizen. The personal laws of the India vary with the Hindu, Jain, Buddhist, Muslim, Xian etc., with its own varieties in each of these for subsects. Religion permeated all personal laws and much of the social laws of the country were so intertwined with religion that it is difficult to separate them.

We have seen in Article 25 freedom of conscience and the right freely to prosper, practise and propagate religion have all been vouchsafed. But therein is also the saving power of the State to make laws regulating or restricting secular activity which may in a way be connected with religious practice. There can also be the power to effect social reform and welfare. It is thus we see the Legislative power conferred in Entry 5 in List 3 of Sch. VII whereby the State can make laws relating to marriage and divorce, infants and minors' adoption, wills, intestacy and succession, joint family and partition etc. As there are many personal laws relating to these matters, Art. 44 aims at a uniformity and would advocate one unified Civil Code for the whole of India. This in effect means the abrogation of personal laws of all denominations, castes and subsects in India and the merger of all such laws into one comprehension code for all Indians. This is to foster national solidarity and unity. The trend in modern times is to do away with personal laws and incorporate in its stead territorial Laws. Turkey is a formidable example for this proposition. Egypt also has achieved similar results. Art. 44 does not affect religious liberties but seeks only to divorce all personal laws from religion, with the result that a uniform civil code touching all matters of the person and property of the citizen can be ushered in to the glory of a unified and nationalistic India with one people, one culture, one law and one voice.

We would, however, enjoin our readers to consider the *pros* and *cons* of the question as to whether a civil code for India is necessary and if it is practicable. We invite a study of the same in the light of the Thesis penned by the author[62a] on the subject and reproduced in Appendix A of this Book. The opinion expressed in the latter has all the reality about it. Mere platitudinous opinion does not take us far. Facts have to be faced as they are and a solution arrived at.

It was questioned how Muslims could embrace any law other than their own. Dr. Ambedkar pointed out in the Constituent Assembly that the Muslims in the Frontier Province and Muslims in some other provinces of India were governed by Hindu Law in regard to succession and that the Shariat Act was passed in 1937 to meet the situation. The Malabar Muslims were governed by the Marumakkattayam Law. The argument that what Britain feared to do after 175 years of rule and whatever the Muslim Rulers dreaded to effect during the course of 500 years of occupation, it may be now hazardous to attempt, loses its significance after a freedom struggle. But then in a free India, if it is the people's will to have one uniform civil code, it is possible. But then the State cannot force such a code against the people's will. The State shall endeavour to prepare conditions ripe for such an expression of the people in favour of such a code. It will certainly be a miracle worthy to be recorded if in Ancient India with its variegated variety of life and peoples, such a uniform code is brought into fruition. It is indeed a very ambitious task. A uniform code without the willing consent of all minorities in India is not really worth having. For such a code will be unreal and will even be in disuse, the old personal laws still having their sway among the dissidents.

The recent attempt at unifying the various systems of Hindu Law into one comprehensive Hindu code has not made much headway. The first part of it relating to marriage, adoption and divorce alone has been found possible to be placed for Parliament's consideration. Under the circumstances, how far it is feasible to usher in a uniform civil code for all the faiths in India, is indeed a problem.

Provision for free and compulsory education for children.

Article 45.—The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all the children until they complete the age of fourteen years.

FOREIGN CONSTITUTIONS.

U. S. S. R.

Art. 121 of the Soviet Constitution posits :—

Vide Citation under Art. 41 ante page.

Eire.

Art. 42 (4) of the 1937 Constitution states :—

The State shall provide for free primary education.

Burma.

Art. 33 (2nd para) says :

'In particular the State shall make provision for free and compulsory primary education'.

62a. Vide Author's Thesis on 'A uniform civil code for India —its scope and practicability' 1951 M.L.J. dated 31-12. Awarded gold medal at State Lawyers Conference at Kozi Kode.

Art. 44 states :

The State shall pay special attention to the young and promote their education.

France.

The preamble in the 1946 Constitution of the Fourth French Republic states :—

'The Establishment of free, secular, public education on all levels is a duty of the State'.

Czechoslovakia.

In the Constitution of the Republic (1948) it is postulated in

Sec. 12.

(1) All citizens have the right to education.

(2) Elementary education is uniform, compulsory and free.

Germany.

The 1949 Constitution of German Democratic Republic posits in :—

Sec. 39.

(1) Every child must be given opportunity to develop thoroughly his physical, mental and moral powers.... Attendance at the technical and secondary schools and at institutes of higher learning shall be made possible for all sections of the nation.

(2) School shall be free of charge. Learning Aids in compulsory schools shall be supplied without payment.

Costa Rica.

The 1949 Republican Constitution postulates :

Sec. 78.

Primary education is compulsory.

Primary, pre-school and secondary education are free and are provided at national expense.

The State shall facilitate the higher studies of persons who lack the necessary funds. The Ministry of Education shall be responsible for the awarding of scholarships and grants-in-aid, through a body appointed by law.

Sec. 82.

The State shall provide food and clothing for needy pupils in accordance with law.

U. N. A.

Art. 23 (1) of the United Nations Declaration of Human Rights posits :—

'Elementary and Fundamental Education shall be free and compulsory'

COMMENTARY.

This Article rightly emphasises the need for free and compulsory education for all children in India. This has to be accomplished at least within the

ten years of the commencement of the Constitution if India has to take its rightful place as a truly welfare state in the comity of nations. India's backwardness in education has to be soon erased. A few percentage (about 5 p. c.) only are educated in the modern sense. The majority of the masses though not educated have a traditional culture in them by ages of traditional education through the aid of epics such as the Ramayana, the Mahabharata and Puranas. But all this may dispel much of their ignorance but the basic need for modern education to unite and read is yet there to be solved. Adults as well as children have to go through a course of compulsory education. The present article limits it to children below 14 years as they are the future citizens of India.

Though under Art. 30 (1) there is the guarantee to the minorities to establish and administer educational institutions, yet it is the duty of the State to provide compulsory education to all below 14 years. Compulsory education is not unconstitutional as there is no fundamental right to remain ignorant[63].

In U. S. A. education is generally regarded as a State function. The Department of Education is wide and has a network of organizations. The system of Grants-in-Aid from the Congress help all higher education. Federal grants help a lot. In Australia education is left to the States. In India the only Central Law is the Universities Act VIII of 1904. The Legislative entry for education is in the States List Entry II in List II Sch. VII. It includes universities but is subject to entries 63 to 66 of List I and 25 of List III.

It was the late Hon'ble Mr. Gokhale who brought a Bill on Elementary Education. His fervour was followed by many zealots in the realm of educational reform. We are yet far away from the cherished goal and if within the ten years earmarked in Art. 45 we achieve universal elementary education it will indeed be a worthwhile feather in our cap.

In *Rev. Fr. Joseph* v. *State of Kerala*[63a] it was pointed out that notwithstanding the Directive Principles embodied in Article 45 and the declared policy of the State Government, the State Government is under no obligation to impart free education and they are not, in law, bound either to pay the teachers or to meet any of the expenses incurred by private schools. All that is said is that with the object of extending and improving secular education a sum of money will be set apart every year to be expended as grants-in-aid to recognised private schools which satisfy the specified conditions. This so-called obligation is further founded on quasi contract.

In re Kerala Education Bill[63b] the Supreme Court said that Art. 45 no doubt requires the State to provide free and compulsory education for all children but there is nothing to prevent the State from discharging that solemn obligation through Government and aided schools and Art. 45 does not require that obligation to be discharged at the expense of the minority communities. The Supreme Court[63b] held that if the right of the minorities to establish and maintain educational institutions under Art. 30 (1) carries with it an implied right to be recognised by the State, then no law of the State can compel them to admit students free and therefore Art. 45 can never become operative, since what it provides is free education for all children and not merely for children other than those who attend institutions falling within Art. 30 (1). Construing Art. 30 (1) and Art. 45 it is clear that the right of minorities who establish

63. *Vide* Cooley 'Constitutional Law,' p. 295.

63a. A.I.R. 1958 Ker 290.

63b. A.I.R. 1958 S.C. 956.

educational institutions of their choice cannot extend to have such institutions recognised by the State.

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

Article 46.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

FOREIGN CONSTITUTIONS.

COMMENTARY

Burma.

Art. 35 postulates :

The State shall promote with special care the educational and economic interests of the weaker and less advanced sections of the people and shall protect them Social Injustice and all forms of exploitation.

Eire.

Art. 45 Cl. (4) (1) Posits :

The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community and which are necessary, to contribute to the support of the infirm, the widow, urphan and the aged.

The present article 46 is of significance in India where society has not advanced uniformly and where there are what are called educationally and economically backward sections.

It is not a question of caste or creed. It is a question of just backwardness. Such minorities exist in a small percentage even in the so-called high caste Brahmins. In South India the Harijans are backward as also others among communities such as padayachis; what are backward classes have been since listed out but probably some yet remain to be included.

The protection is only for the weaker sections, the Scheduled Castes and the Scheduled Tribes. There is no difficulty regarding the latter as both Arts. 46 and 15 (4) apply to them.

Art. 366, cl. (24) defines Scheduled Castes, as castes, races or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be Scheduled Castes for the purposes of the Constitution. The (Scheduled Castes) Order, 1950 has been the Presidential order under Art. 341, detailing the various Scheduled Castes in each area in India.

Art. 342 describes similarly the Scheduled tribes and we have a similar Presidential order called the Constitution (Scheduled Tribes) Order, 1950 specifying the tribes in each area.

The difficulty is in demarcating which is 'the weaker section of the people'. This has to be decided by the court in each case ; as also as to whether a class of citizens is socially and educationally backward within the meaning of Art. 15 (4) and also as if it is a 'backward class' within the meaning of Art. 16 (4).

We have the pregrant observations of Visvanathan Sastriar J., in Champakam Derairajan v. State of Madras[64] in this regard "I am unable to assent to the suggestion of the Advocate-General that non-Brahmin Hindus constitute one of the 'weaker sections of the community'. A community which has fur-

64. A.I.R. 1951 Mad. 120: I.L.R. (1951) Mad. 149 (F.B.).

nished successive vice-chancellors of great distinction for all the three universities of this State, several Law officers of the State like Advocate-Generals, public prosecutions, and Government pleaders, distinguished judges of this court, competent administrative officers functioning both in the Union Government and as heads of Districts and departments in this State, physicians, surgeons and obstetricians of all-India reputation, industrial magnates, millowners and enterpreneurs of great business ability and affluence and nine out of twelve ministers of the State administering its affairs today cannot, with any sense of appropriateness, be described as a weak section of the body politic requiring discriminative protection against other sections. In all the competitive walks of life the members of the non-Brahmain Hindu community are in the forefront having won their place, I dare say, by reason of their ability, industry and educational attainments and organizing capacity. I am not bound, as a judge to affect a cloistered aloofness or seclusion from facts that every person in the State is aware of and to insist pedantically on detailed evidence of matters of common knowledge especially when dealing with the constitutional rights and privileges of citizens".

The learned judge put it petite and the tragedy of modern power politics in public life is that interested persons bolster up the claims of their kith and kin on the sad plea of 'weaker sections of the community' with little or no justification for the same. Art. 46 is not there to be exploited by scheming power seekers but is designedly meant to foster the true claims of the really weaker sections of society.

As we had already adverted to in our Commentary under Arts. 15, 16 and 29, the object of the Constitution is to safeguard certain fundamental guaranteed rights. Art. 15 (1) enjoins no discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Art. 29 (2) prohibits denial of admission to educational institution on similar grounds while Art. 16 (4) is a similar provision with regard to public appointments. But it must be seen that Arts. 15 (1), 29 (2) and 16 (4) remain unaffected by Art. 46 which is only a directive principle and not a fundamental right. Only the latter can be justiciable. The plea in Champakam's case[64] by the Government of Madras was they had to safeguard the weaker sections of the people under Art. 46 as a directive principle was fundamental in the governance of the State as required by Art. 37 and that Art 46 overrides Art. 29 (2). Their Lordships of the Supreme Court[65] in affirming the Madras High Court judgement observed that Art. 29 (2) is not at all controlled by Art. 46 and that the omission of a provision corresponding to Art. 16 (4) in Art. 29 is significant. The reservation for backward classes which was thought necessary in the matter of appointments was not considered necessary in the matter of admission in the educational institutions.

This decision brought in its wake the Constitution First Amendment Act wherein a new Clause (4) to Art. 15 is to the effect: "Nothing in this Article or in Clause (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes".

Thus we have the new words "socially and educationally backward classes". Which term obviously include those of that category from all communities. The State can therefore no more reserve seats or appointments according to religion, race or caste as was made by the Communal G. O. in the instant case[64].

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65. A.I.R. 1951 S.C. 226: (1951) D.L.R. 239 (S.C.): 1951 S.C.J. 313: 1951, S.C.R. 525.

What emerges from Champakam's case is that "The Directive Principle State Policy have to conform to and run as subsidiary to Chapter of Fundamental Rights..... However, so long as there is no infringement of any fundamental right, to the extent conferred by the provisions in Part III there can be no objection to the State acting in accordance with the directive principles set out in Part IV but subject again to the Legislative and executive powers and limitations conferred on the State under different provisions of the Constitution .....".

Even after Constitutional First Amendment it must be seen that what is protected are the rights under Part III and not the declarations in Part IV. Thus Arts. 15 (4) and 29 (2) enable the state to make special provision only for the advancement of 'socially and educationally backward classes of citizens'.

Who are they? This is a question arising to be decided on the facts of each case. Art. 46 speaks of 'the weaker sections of the people'. But it is possible an economically weaker section of the people may not be socially and educationally backward and *vice versa*. Art. 46 enjoins on the State to devote special care to the educational and economic interests of the weaker sections of the people. But Arts. 15 (4) and 29 (2) cannot be attracted unless there is 'social and educational backwardness' and there is no question there of 'weaker sections of the people'. Further, in an educationally backward class, there may be no economic backwardness in which event Art. 46 may not apply while Art. 15 (4) will apply.

We may conclude while Art. 46 and allied Articles 15, 29 and 16 are meant to further the interests of the really backward class they ought not to be allowed to be exploited by people who do not deserve such protection. If the latter tendency is encouraged by fissiparous practical interests at State level, the advancement of India as a whole as a welfare State will be long delayed as the really backward will long stand neglected.

The Assam High Court held in Bhanuram Pegu v. Commr. of Hills Division[1] that the Excise Appellate Authority functioning under the Eastern Bengal and Assam Excise Act (1 of 1910) is a quasi-judicial body. Even where it functions as administrative body, it would still be amenable to the supervision of the High Court as vouchsafed by the Constitution if they acted beyond the scope of their authority as provided by the Rules. In the instant case it was also held that the Appellate authority was in error in holding contrary to Art. 46 that the petitioner could have no superior claim as a tribunal.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

Article 47.—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

FOREIGN CONSTITUTION.

Burma.

The 1948 Constitution of Burma provides in

Art. 36 :

The State shall regard the raising of the standard of living of its people

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65a. A.I.R. 1957 Assam 182.

and the improvement of public health as among its primary duties.

Art. 38 :

The State shall promote the improvement of public health by organizing and controlling health services, hospitals, dispensaries, sanatoria, nursing and convalescent homes and other health institutions.

Art. 39 :

The State shall take special care of the physical education of the people in general and of the youth in particular in order to increase the health and working capacity of the people and in order to strengthen the defensive capacity of the State.

France.

Vide Foreign Constitutions under Art. 43 ante.

Rumania.

Vide Foreign Constitutions under Art. 43 ante.

Czechoslovakia.

Vide Foreign Constitutions under Art. 43 ante.

COMMENTARY

This Article 47 emphasises the needs of

I. (a) Raising the standard of living.

(b) And level of nutrition.

(c) Improvement of public health.

II. To endeavour to bring about prohibition of all intoxicating drinks and drugs except for medicinal purposes.

The first part of Art. 47 to raise standards of living etc., is once again emphasising what was urged in Art. 39 (8) and Art. 43. A drive for increasing standard of living can best be done by avoidance of waste and using the individual's and nation's economy to the best advantage. A welfare state cannot function as such if there is extravagance and waste in public or private life. At Governmental level or in the private citizens' life the motto must be simplicity and best use of the material and moral resources at their disposal. To be frugal and parsimonious is not economy. Level of nutrition and standard of living cannot be raised that way. A robust and robust outlook spending without extravagance is needed. For this the nation's economy must be at top point and production on all fronts, both in the private sector and Governmental public sector must be at peak. A robust civic consciousness and hygienic conditions can alone promote public health.

These duties devolve not only on the citizen but also the State. The term 'State' includes all its organs inclusive of municipal bodies[66]. A bye-law by a Municipal Board preventing slaughter of bullocks, cows and calves was held to be quite in accordance with this article as also the Municipal law in so far as by protecting cattle, the output of milk and the level of nutrition get increased[66]. Art. 48 enjoins protection of cattle and so any Fundamental Right arising under Art. 19 (1) (g) to carry on the business of cow slaughter and vending of meat can never be affected as under Art. 19 (6) a reasonable restriction can be exercised for public good. As we had already stated Articles 46 and 47 afford sufficient public purposes for imposing such a restriction[66].

66. *Bhuddu* v. *Allahabad Municipality*, A.I.R. 1952 All. 758.

Prohibition.

In the matter of prohibition, Art. 47 visualizes total prohibition as the ultimate goal towards which the State must make always an endeavour. There is no other constitution of the world where prohibition is enjoined in the Constitution as such. It must be remembered that to have really effective prohibition, there must be universal economic contentment and education. If these aspects are rudimentary prohibition will be a failure, not to speak of the enormous loss in Public Revenues by such a policy which also adds to the cost of administration by a vastly paid prohibition staff. The protagonists of prohibition will not mind the cost. But if they succeed it is all good. If not, what a waste in hasty measures as we now see in Madras and Bombay States where after some years of experience we find smuggling on the increase, the entire Community in some villages and even women folk in families resorting to illicit manufacture all owing to the lure of lucre in a sadly impoverished society. So it will be wise to defer prohibition schemes till there is alround economic contentment in the masses. A poor man wants excitement by drink to drown his poverty. If he is made robust, well to do and given some work and education, the temptation to lapse into drunkenness gets remote. Hence it is that in Art. 47 we have the words 'The State shall endeavour to bring about prohibition'. The endeavour does not lie in merely legislating a prohibition Act but in creating conditions in Society which will repel intoxicating drinks. Economic betterment, alternative modes of enjoying leisure with health, education, hygienic conditions and civil consciousness, these the State must first 'endeavour' to produce, foster and develop before embarking on further programmes of banning of intoxicating drinks.

A restriction of a fundamental right to have in drinks on account of a prohibition policy as outlined in Art. 47 is quite constitutional. But Art. 47 is only directory. It cannot confer legislative competence, where otherwise no such power exists. Thus in Firm Nuserwanji Balsara v. State of Bombay[67] the question was if a provision of the Bombay Prohibition Act 25 of 1949 was *intra vires* having regard to the provisions of the Government of India Act 1935 under which alone Act 25-49 was legislated. A reference to Art. 47 was made at the time of argument for invoking legislature competence. Chagla J., observed, "Art. 37 of the Constitution provides that the Directive Principles are fundamental in the governance of the country but are not enforceable by any court. They are in the nature of instrument of Instructions which both the legislature and the executive are expected to respect and to follow, but they do not confer any legislative competence on a legislature in respect of any matter over which it has no competence."

A prohibition law cannot be said to infringe Art. 19 as the prohibition of intoxicating liquor etc., is a reasonable restriction particularly when Art. 47 declares it as a Fundamental Directive policy.

Equally so the prohibition of all liquids including, toilet and medicinal preparation is unreasonable restrictions in so far as Art. 47 excepts them.

The Supreme Court in a recent case in Cooverjee B. Bharucha v. Excise Commissioner, Ajmere[68] invoked the principle enunciated in Art. 47 in relation to Art. 19 (6). Their Lordships observed, "That when liquors are taken in excess the injuries are confined to the party offending is a fact which does not exist. The injury it is true first falls upon him in his health which the habit undermines, in his morals which it weakens; and in the self-abasement which it creates.

67. A.I.R. 1951 Bom. 210. (in appeal A.I.R. 1951 S.C. 318 this point is not affected.).
68. A.I.R. 1954 S.C. 220.

But as it leads to neglect of business and waste of property, and general demoralization it affects those who are immediately connected with and dependant upon him. By the general concurrence of opinion of every civilised community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The sale of such liquors in this way has therefore been at all times by the courts of every State, considered as the proper subject of legislative regulation.

The existing law viz., the Bombay Prohibition Act XXV of 1949 was sustained by the Supreme Court in State of Bombay v. Nusserwanji though certain Sections such as Sections 10 (c)-(d), 13 (b); 23 (a)-(b); 24 (1)a; 136 (1); 136 (2) (b) (e) (f) were declared void. In the same case it was held that a State legislature is competent to enact a Law relating to prohibition under Entry 8 of List II (intoxicating liquors); Entry 8 of List II and Entry 14 of List II denoting 'public health' also gives legislative competence to the State legislature.

In a Travancore case[69] the Cochin Abkari Act was held *intra vires* of Art. 19 (1) (f) and Art. 47. All the tests mentioned in A.I.R. 1953 Mad. 476 (478) by which the reasonableness of a restriction is measured, operate to uphold the impugned rules as the purposes of public security, public order, public health, and public morality which are the ultimate objects to be achieved by prohibition and restrictions calculated to bring about a progressive reduction of liquor traffic are steps in the right direction as they lead towards prohibition and are legitimate and necessary. These are also the objectives for the realization of improvement of public health which is a cardinal directive principle as set out in Art. 47. Hence no one can claim a legal right to sell liquor. The control of this trade by regulation or even prohibition has been recognized by the directive in Article 47[70].

In the East Bengal and Assam Excise Act 1 of 1910, Sec. 17 (3) which imposes restrictions on use of intoxicants as beverage was held not to contravene Articles 14 and 19. It was also in accordance with the directive in Art. 47[70a].

Organisation of agriculture and animal husbandry.

Article 48.—The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

COMMENTARY.

This is salutary directive for improving the nation's wealth. India being predominantly an agricultural country its wealth is in that field and the co-ordinate development of animal husbandry. Cattle wealth and produce wealth are the twin treasures of India. Cottage industries, big industries and the like come next in importance. Animal husbandry on scientific lines has yet to make a big headway in India. Improvement of breeds and the prohibition of slaughter of cattle—cows, calves, and other milch and draught cattle—is also of paramount importance. The Legislative Entry in this regard is Entry 14 and Entry 15

68. 5 D.L.R. Bom. 213: A.I.R. 1951 S.C. 318.
69. *S. Narayana Pillai* v. *State of T.C.*; A.I.R. 1954 T.C.S. 504.
70. *Messrs. Ghaico Mall & Sons.* v. *The State of Delhi*, A.I.R. 1956 Punj. 97.
70a. *Balbir Singh* v. *The State* A.I.R. 1958 Assam 173.

II of Sch. VII.

Entry 14.—Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

Entry 15.—Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

The U. P. Prevention of Cow Slaughter Act (1 of 1956) is the result of the injunctions in the directive principles contained in Art. 48[71a]. The Act sedulously ignores the religious or sentimental aspect of the subject; it views it as an economic proposition which is a weighty consideration in agricultural economy. It only bans the slaughter of the cow and its progeny and the sale and transport of beef. It does not penalise the possession or eating of beef.

In *M. H. Quareshi* v. *State of Bihar*[71b] the Supreme Court posited that there is no conflict between the different parts of Art. 48 and indeed the two last directives for preserving and improving the breeds, and for the prohibition of slaughter of certain specified animals represent, as is indicated by the words 'in particular', two special aspects of the preceding general directive for organising agriculture and animal husbandry on modern scientific lines. Whether the last two directives are ancillary to the first or are separate and independent items of directives the directive for taking steps for preventing the slaughter of animals is quite explicit and positive and contemplate a ban on the slaughter of the several categories of animals specified therein, merely cows and calves and other cattle which answer the description of milch and draught cattle. The protection recommended by this part of the directive is confined only to cows and calves and to those animals which are presently or potentially capable of yielding milk or of doing work as draught cattle but does not, from the very nature of the purpose for which it is obviously recommended, extend to cattle which at one time were milch or draught cattle but which have ceased to be such. It is in pursuance to the directive principles contained in Art. 48 and in exercise of the powers conferred by Arts. 245 and 246 read with entry 15 in List II of the Seventh Schedule that the Legislatures of Bihar, U. P. and M. P. have respectively enacted Bihar Act 2 of 1956, U. P. Act 1 of 1956 and C.P. and Berar Act 52 of 1949 as amended up to 1956.

In the Bihar Act, the words 'bull', 'bullock', 'calf' and 'cow' have been defined in clauses (c) (d) (e) and (g) of Sec. 2 as belonging to the species of bovine cattle. The expression 'species of bovine cattle' is wide enough to include and does in ordinary parlance include buffaloes (male or female adults or calves). Therefore, the corresponding categories of buffaloes namely, buffalo bulls, buffalo bullocks, buffalo calves and she-buffaloes must be taken as included in the four defined categories of the species of bovine cattle and as such within the prohibition embodied in Sec. 3 of the Act.

In the instant case[71b] the Supreme Court held that the impugned Act is *intra vires* of Arts. 14 and 25. The C. P. and Berar Act 52 of 1949 is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but it was held void under Art. 19 (1) (G) in so far as it totally prohibits the slaughter of breeding bulls and working bullocks without prescribing any test or requirements as to their age or usefulness. The Act was held valid in so far as it regulates the slaughter of animals under certificates granted by the authorities mentioned therein.

Shri S. R. Das, Chief Justice, in the instant case finally said, "To summarise :

71a. *Dulla* v. *State* A.I.R. 1958 All 198 : 1958 Cr. L.J. 316.

71b. A.I.R. 1958 S.C. 731.

The country is in short supply of milch cattle, breeding bulls and working bullocks. If the nation is to maintain itself in health and nourishment and get adequate food, our cattle must be improved. In order to achieve this objective our cattle population fit for breeding and work must be properly fed and whatever cattle food is now at our disposal and whatever more we can produce must be made available to the useful cattle which are *in presenti* or will *in futuro* be capable of yielding milk or doing work. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle the much needed nourishment. The presence of so many useless animals tend to deteriorate the breed. Total ban on the slaughter of cattle, useful or otherwise is calculated to bring about a serious dislocation though not a complete stoppage of the business of a considerable section who are by occupation butchers (kasais), hide merchants and so on. Such a ban will also deprive a large section of the people of what may be their staple food. At any rate, they will have to forego the little protein food which may be within their means to take once or twice a week..... So approaching and analysing the problem we have reached the conclusion: (i) the total ban on the slaughter of cows of all ages and calves of cows, and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48; (ii) that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the staughter of she-buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interests of the general public".

Protection of monuments and places and objects of national importance.

Article 49.—It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, [declared by or under law made by Parliament] to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be.

COMMENTARY.

The Directive Principles here make a departure from mere material, health or moral objections and take the new field of culture and aesthetics. Education, economic welfare and health cannot be complete without a development of the nation in matters of art or history. Ancient monuments, places or objects of artistic or historic interest have to be preserved, revered and enjoyed. When they are of special national importance, Parliament by law so declares it and gives it all the protection from ravages of spoilation, disfigurement, destruction, removal etc.

One such law is the Ancient Monuments Preservation Act of 1904. The Recent Statute is the Ancient and Historical Monuments and Archaeological Sites and Remains (Declarations of National Importance Act 71 of 1951).

The relevant Legislative Entries are Entries 67 of List I and 40 of List III of Sch. VII.

List I Entry 67 :—Ancient and historical monuments and records and archaeological sites and remains, declared by Parliament by Law to be of national importance.

List III Entry 40 :—Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

Separation of judiciary from executive.

Article 50.—The State shall take steps to separate the judiciary from the executive in the public services of the State.

COMMENTARY.

This is a cardinal principle in judicial administration, namely, that the judiciary to be sacrosanct and thoroughly independent must be really separated from the Executive. The separation of these functions—judicial and executive—is of prime importance to uphold the dignity and prestige of the judiciary to remove all semblance of executive influence. This has been the age-long cry of nationalists from the early days of the struggle for Indian freedom. After Independence was achieved nevertheless the enthusiasm for his ideal is not too much in the fore-front as the reformers in this line belong to the party in power—the Congress. But a principle is a principle and so in some States, particularly Madras which led in the matter of this reform, there has been a separation of the judiciary and executive in most areas of the State in gradual stages. The Madras Government appointed a committee to make a special report on the matter and the result is we have a voluminous report portraying the defects which creep in due to want of separation. As Montesquieu put it 'There is no liberty if the power of judging be not separated from the legislative and executive powers'. Instances are not wanting (as the Madras Report reveals it) where a magistrate erred in his judgment of a pending case due either to executive interference or fear of executive displeasure. The District Collector was both the executive head and the judicial head and hence such a position will never be conducive to have unbiassed view from the officer at the top nor can a fearless subordinate judiciary exist with the democles sword of executive displeasure through the pen of the immediate superior officer who is both a judge in appeal of revision and the executive head. The reform to be real must be clear-cut at all levels and half-hearted measure (as in Madras) in this separation attain with an eye on false economy is none too good.

Popular liberties can never be properly protected under hybrid or ambiguous conditions. Sedgwick stated "The right of suing or prosecuting Government officials for any illegalities committed by them in performance of their functions for if the conduct of one member of the executive had to be judged by another, or by a judge practically under its control, the *espirit de corps* which may be presumed to exist in the executive as a body and its natural tendency to resist any restriction on its powers would diminish to complainant's chance of obtaining an impartial hearing and adequate redress".

Meredith J., of the Patna High Court put it thus[71] "Why then are Munsifs as a body are trusted by the public while the magistrates as a body are not? ..... The subordinate magistrates are under the administrative control of the sub-divisional officer, he in turn under that of the District Magistrate and thence the hierarchy proceeds direct through the Commissioner to the executive Government". Low Hewert in his 'The New Despotism'[72] speaks of the official thus "Although he acts in good faith and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind which is a very different thing from a judicial mind".

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71. *Vide* Sidgwick's Elements of Prolities P. 481 3rd Edn. 1908.
72. Quoted in Dr. Katja and the Separation of the Executive and Judicial Functions (1949) 2 Indian Law Review 99 (102-40) *vide* also Chitlay's Indian Constitution 1st Vol. P. 854-855.

A judicial mind is detached impartial on merits bereft of all influence or mental reservation. Hence it is that even in Republic India this principle of judicial independence should be kept aloft, unsullied and untarnished. That country is great which could boast of a great judiciary who keep aloof aloft and just and import into their judgments erudition truth, fearlessness, clarity and impartiality.

The pace with which this reform of separation is effected in Madras or as seen in a rudimentary form in Bombay, is rather slow. Executive nervousness must be eschewed over this reform. Boldness in this is possible only if the men at the top and in a measing even in the rank and file of the party in power are men inbued with a clear vision, honesty, upright conduct and self-reliance. The strong will welcome an independent judiciary. Only the weak will cling to the executive ridden judicial system.

It is noteworthy that the original time limit of three years in the draft article was omitted in Art. 50 as it finally emerged. Obviously, no fetter of time limit will help the ushering in of this great reform. The reform though overdue cannot be hustled.

The Punjab High Court held[1] that the Gram Panchayat Act, 1952 of Punjab was *intra vires* of Art. 50. Article 50 must be deemed directory and not a mandatory provision. In setting up Panchayats the State Legislature has not violated the directive principle embodied in this Article or endeavoured to merge judicial and executive functions.

Article 51.—The State shall endeavour to—

Promotion of international peace and security.

(a) promote international peace and security ;

(b) maintain just and honourable relations between nations ;

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another ; and

(d) encourage settlement of international disputes by arbitration.

FOREIGN CONSTITUTIONS.

France.

The preamble of the 1946 Constitution of the Fourth French Republic States :—

The French Republic faithful in tradition abides by the rules of international public law. It will not undertake wars of conquest and will never use its arms against the freedom of any people. On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace.

Eire.

Art. 29 says :—

"(1) Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.

(2) Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

72a. *Gurdial Singh* v. *State* A.I.R. 1957 Punj 149 : I.L.R. 1957 Punj 334.

(3) Ireland accepts the generally recognized principles of international law as its rule of conduct in its relation with other States".

COMMENTARY ON FOREIGN CONSTITUTIONS

England.

International Law has been described by Lord Russel of Killowen as the 'sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another[73]. Normally, English courts administer only Rules of English Law and not those of International Law. In re. Zamora[74] during World War I a neutral ship Zamora armed by Sweden was brought into an English port for search. It was found that there was a large cargo of copper. This being very useful in war, the war office requisitioned the consignment for its own purposes by an order in council. The matter was one of International law. The Prize court through a Municipal court administers International Law. The argument that the crown was uncontrolled in Foreign affairs was overruled. It was laid that the crown cannot legislate by order in council without the assent of Parliament, so as to alter the Rules of International Law to be enforced in the Prize courts and that an order in council like every other act of the prerogative is 'sublege'. The Privy Council opined that the Prize courts existed in order to administer International Law and the crown must not act upon its own views of the law but must accept it as interpreted by the Privy Council. "It is true that under a number of modern statutes various branches of the executive have power to make rules having the force of Statutes but all such rules derive their validity from the statute which creates this power and not from the executive body by which they are made". Lord Alverstone, C.J., in the West Rand case[73] stated that matters which fall properly to be determined by the crown by treaty or as an act of state are not subject to the jurisdiction of the municipal courts. His Lordship further added, "But it is quite true that whatever has received the common consent of civilized nations must have received the assent of our country and that to which we have assented along with other nations in general may properly be called International Law and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant".

Slowly such rules of International Law which have become acceptable to the country also became to be recognized as part of the municipal law of the country. Thus Lord Atkinin in Re Chung Chi Cheung[74a] observed, "It must be remembered that so far at any rate as the courts of this country are concerned International Law has no validity, save in so far as principles are accepted and adopted by our own domestic law..... The courts acknowledge the existence of a body of rules which nations accept amongst themselves on any judicial issue, they seek to ascertain the relevant rule and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by Statutes or finally declared by their Tribunals".

A practice has also grown in England in the field of interpretation of Statutes, that courts should presume that Parliament did not intend to violate established principles of International Law[74b]. In cases of ambiguity that construction will be favoured which will be in accord with International Law. But nevertheless a municipal court will enforce only an Act of Parliament in pre-

73. (1905) 2 K.B. 391 (407) *West R. and Central Gold Mining Company* v. *Rex.*
74. (1916) 2 A.C. 77.
74a. (1938) 4 All. E.R. 786: 1939 App Ca. 160.
74b. *Bloxam* v. *Favre* (1884) 9 P.R. 130.

ference to a rule of International Law where especially the latter is in conflict with the former[75]. As was stated by Lord Atkin the rule of International Law has no validity in England over the Law laid down by the Parliament of England.

So only so much of International Law as have been widely accepted and are not in conflict with Municipal Law will be recognised by the English Courts[76]. It must be of such significance that no civilised nation could afford to repudiate them. Such International Law is generally absorbed in the Municipal Law of the country particularly when there is no conflict with the law of the land. International Law is one that in recognized by nations. Mere opinion of even eminent jurists are of no binding effect[77]. For in the words of Lord Alverstone C.J.[77]: "They (opinion of Jurists) must have received the express sanction of international agreement or gradually have grown to be part of International Law by their frequent practical recognition in dealings between various nations".

In applying rules of International Law the court has a wider range of authorities than when dealing a municipal law. As laid by Lord Sankey "The sources from which International Law is derived include treaties between various states, state papers, municipal acts of Parliament and the decisions of Municipal Courts, and last but not least, opinions of Juris consuls, or text book writers. It must be remembered that in the strict sense, International Law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the United Nations to draw up Codes of International law".

America.

The Principle that International Law is part of the law of the land has been more clearly adopted in U.S.A., J. C. Perges would state[78]. "In maintaining international law as a part of the common law American courts have gone far in making the law not only as a rule of conduct for sovereign states but for citizens as well".

It may be noted that "under the Constitution of United States, even international agreements to which the executive Government is a party are part of the supreme law of the land, for clause 2 of Art. VI of the Constitution of United States expressly declares :—

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land and the judges in every State shall be bound thereby, anythings in the Constitution or laws of any state to the contrary notwithstanding"[79].

Following the above reasoning it has been held that the Supreme Court of America has power to set aside treaties[80].

If a conquest is made by U. S. A. or a cession made to them and the same arise for consideration of the Supreme Court, the latter is free to apply any rule of International Law relevant and appropriate to the occasion. In United States v. Percheman[81] (a case arising out of the acquisition or Florida and Louisiana by cession) Marshall C.J., said, "It is very unusual even in cases of

75. *Mortensen* v. *Peters* (1906) 8 Fraser 93.
76. *Inre Piracy* Jure Gentium 1934) A.C. 586.
77. *West Rand Gold Mining Co.* v. *Rex* (1905) 2 K.B. 391.
78. Judicial Interpretation of International Law on U.S.A. P. 27.
79. Quoted in *Ajaib Singh* v. *State of Punjab,* A.I.R. 1953; Punj. 309 (319): I.L.R. 1952 Punj. 381.
80. Quoted in *Ibid. Ware* v. *Hyloon* (1796) 3 Dall 199; *State of Missouri* v. *Holland* (1920) 252 U.S. 416.
81. 7 Paters 51 (86).

conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property generally confiscated and private rights annualled.

In a latter case Cook v. United States[82] the principle was clearly set out that a subsequent treaty supercedes a prior conflicting statute and that a treaty will not be deemed to have been abrogated or modified by a later statute unless the legislature in U. S. A. clearly expressed itself to that effect. Thus state legislatives in U.S.A. have come to shoulder international responsibilities and respect for International Law[83].

Municipal Courts in U.S.A. apply rules of International Law on the theory of their implied adoption by the State. They have thus come to be recognized as part of the Municipal Law till the congress chooses to supersede or modify them[84] or if it is altered by subsequent treaties entered into by U. S. A. Again no court will interpret an act of congress as violating any principle of International Law, unless there is no other construction possible[85]. While Municipal Laws have to be proved, courts do not require proof of principles of International Law. Judicial notice is normally taken of such rules and proper sources[86] of this law are studied and opinions of Jurists[87] as also usages and acts of civilised nations are taken into account.

As stressed in Hilton v. Guyot[88] the term International Law includes both public international law and private international law or the conflict of laws and concerning the rights of persons within the territory and dominion of one nation by reason of acts, private or public, done with the dominions of another nation. It has been noted that consent is the real basis of the applicability of International Law by the Judicial Tribunal of a country. Justice Gray opened in Hilton v. Guyok[88] : "No Law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force, within its territory whether by executive order, by legislative Act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our great jurists have been content to call the 'Comity of Nations'. Although the phrase has been criticized, no satisfactory substitute has been suggested. 'Comity' in the legal sense is neither a matter of absolute obligation on the one hand nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation having due regard both to international duty and convenience and to the rights of its own citizen or of other persons who are under the protection of its laws".

OTHER COUNTRIES.

In France, Belgium, Switzerland and Germany the incorporation of customary international law as part of the law of the land has come into being[89]. Anglo-American doctrines of International Law have slowly permeated into many countries since the first World War (1914-18).

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82. 288 U.S. 102.
83. Perglers Judicial Interpretation of International Law in U.S.A. P. 24.
84. The Neraide 9 Cr. 388.
85. *Bloxam v. Favre* (1883) 8 P.D. 101; *Murrey* v. *Schooner Charming Betsy* (1804) 2 Law Ed. 208.
86. The Scotia 14 Wall. 170.
87. *Chungchi Cheung* v. *King* (1939) A.C. 160.
88. (1895) 40 Law Ed. 95: 159 U.S. 163.
89. *Vide* Pergler. Judicial Interpretation of International Law in U.S.A. 24.

Thus Art. of the Weimar Constitution of 1919 postulates :

"The universally recognised Rules of International Law are valid as binding constitutional parts of German Federal Law".

To similar effect are Art. 8 of the Australian Constitution of 1934, Art. 9 of the 1831 Spanish Constitution and Art. 7 of the Esthonian Constitution. Certain accepted notions have to stay in the application of International Law. Thus a presumption has grown against the existence of any conflict between a Municipal Law and an International Law[90]. Where there is gap in the Statutes of a civilized state regarding some rules necessitated by the law of nations, the presumption will be drawn by courts that such rules have been tacitly adopted by such Municipal Law. Sir Cecil B. Hurst postulates the consent theory thus[91]: "To be subject to and to be bound by the rules of International Law is the necessary consequence of existence of a State".

India.

Article 51 affirms the principle of International Law being recognised by the State in India. The Directive to the State is that it shall endeavour—

1. to promote international peace and security,
2. maintain just and honourable relations between nations,
3. foster respect for International Law and treaty obligations in the dealings of organized peoples with one another and
4. encourage settlement of international disputes by arbitration.

The clause (1), (2) and (4) appear to flow from one another all indicating the objective to be happy foreign relations for India and solution of all International problems by peace and goodwill.

Clause (3) takes us to a tacit appreciation of International Law and to respect it by bowing down to it. In effect it appears to indicate that it is the duty of courts to apply accepted principles of International Law when conflict of laws arises. Just as in America and England private international law subject to such modifications as are made by the municipal law of the country may be treated as part of the Municipal Law administered by the courts and applicable wherever conflict of laws appears. This practice if adopted in India will be in accord with the practice in all civilized countries.

In Ajaib Singh v. State of Punjab[92] the question of recognition of foreign treaties arose. The treaty was with Pakistan in which it was agreed to by both countries to take steps for the recovery and restoration of abducted persons during the communal riots on the wake of the partition of India in 1947. It was held in the instant case the provision in the Abducted Persons (Recovery and Restoration) Act, 1949 for removal from India of any citizen of India who came within the definition of abducted person, was *altra vires* and void as it contravened Art. 19 (1) G which permitted a citizen to carry on any business. Such a business can be carried on only if he were in India. It was also held that the infringement of a fundamental right was paramount and cannot be cured by a treaty condition with Pakistan that such abducted persons shall be handed over. The State though directed under Art. 51 to do so cannot override the obligation to protect Fundamental Rights of citizens. So as we had already stated Part IV Directives cannot override Part III Fundamental Rights.

All that Art. 51 enjoins that India shall foster respect for International Law and treaty obligations. Art. 253 empowers Parliament to enact legislation im-

90. Oppenheim Vol. IV Ed. p. 39 *See* also PP. 41 and 42.

91. *Vide* K.R.R. Sastri's 'Studies in International Law' p. 21.

plementing treaty obligations. Neither of Arts 51 and 253 empowers Parliament to make law which can deprive a citizen of India of the Fundamental Rights conferred on him[92]. In America treaties by themselves become part of the law of the land. But not so in India. Thus in Nanka v. Government of Rajasthan[93] it was held that an extraditing treaty between the Maharaja of Indian State and British Government not incorporated in the Municipal Law of the State is not binding on the subject. In India Acts passed for implementing treaties cannot override the guaranteed rights in Part III of our Constitution[92].

Sinha J. stated in Indian and General Investment Trust Ltd. v. Sri Ramachandra[94] that 'Private International Law' was so called as it deals with the legal relations of individual and not of States. It is international "inasmuch as it deals with conflict of laws of different nations. It is properly called Law, inasmuch as its rules are enforced by courts, and in that respect, it is a branch of the ordinary law of the land".

Except where the Rules of Private International Law have been accepted as part of the domestic law of this country, Indian courts are not bound to apply them. Sinha J., put it pithily[94] that though till then we had followed the English Rules it was no longer incumbent after the Independence of India was attained to follow the English rules or 'for the matter of that, any rule excepting our own'.

We may give all respect to sources of International Law, acts and statutes of foreign nations, opinion of Jurists, International custom, usage etc. In fact Sec. 13 of the Code of Civil Procedure is an instance where foreign judgments are recognized. They are deemed conclusive under Sec. 13 as apparent on the face of it. This is in fact a recognition of International Law and a contrivance whereby foreign judgments are made part of our Domestic Law.

It will be seen that the Constitution of India has not adopted any of the provisions of the Declaration of Human Rights without modification and Article 51, being in the Chapter dealing with Directive Principles, is not enforceable in the High Court in view of the express bar of Art[95]. A judge of a High Court is bound by the oath of his office to uphold the Constitution—Doubtless if there is no express provision like Art. 31 or 31-A the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights might possibly be invoked in favour of petitioners in the instant case[95] (in re. Tenancy Laws : Orissa Estate Abolition Act 1 of 1952) on the doctrine of the wise use of public policy. But since Art. 31 expressly bars the jurisdiction of court to question the adequacy of compensation it is futile to rely on Art. 17 (2) of the Universal Declaration of Human Rights—The provisions of the latter where they conflict with the provisions of the Constitution of India will be of no avail in Municipal Courts[95].

The principle of International law was invoked in a Manipur case[96]. In 1949 the Manipur State passed a resolution that Patta granted to certain persons for more than 10 paris of land without special permission of the Government was against the customary law of the country. The succeeding Government of the State in 1952 in being fair to the persons in long possession of such excess lands were by an order allowed to dispose of it to actual tenants. It was held that the resolution of 1949 would not attract the principles of international law embodied in Art. 51 (c) inasmuch as the old Government had the power to allow the holders to hold land in excess of 10 paris. The succeeding Government had also similar powers[96].

92. A.I.R. 1952 Punj. 309.
93. A.I.R. 1951 Raj. 153.
94. A.I.R. 1952 Cal. 508.
95. *Bisvambhar* v. *Orissa State* A.I.R. 1957 or 247.

CHAPTER XII

SUPPLEMENTAL CHAPTER ON FUNDAMENTAL RIGHTS

Since the first volume of this book contains case law upto the end of December 1958, it has been found necessary to bring into line with this volume incorporating the important judicial decisions upto August 1959. We have therefore added in this Chapter a discussion on the relevant case law till the later date for Articles 12 to 51.

ARTICLE 13.

Directive Principles and Article 13.

In *M. H. Qureshi* v. *State of Bihar*[1] it was pointed out that Article 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chapter II of the Constitution. The Directive Principles cannot override this categorical restriction imposed on the Legislative Power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the Directive Principles but it must do in such a way that its laws do not take away or abridge the Fundamental Rights, for otherwise the Protecting Provisions of Chapter III will be a "mere rope of sand".

In *Deep Chand* v. *State of U. P.*[2] the Supreme Court stated that the combined effect of Articles 13, 31, 245 (1) and 246 may be stated thus : Parliament and the legislatures have power to make laws in respect of any of the matters enumerated in the relevant lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution including Art. 13. There is a clear distinction between the two Clauses of Art. 13. Under Clause (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III whereas no post-Constitution law can be made contravening the provisions of Part III and the law to that extent though made is a nullity from its inception. The doctrine of eclipse has no application to post-Constitution laws infringing the Fundamental Rights as they would be *ab initio* void *in toto* or to the extent of their contravention of the Fundamental Rights (per Baghavati, Subba Rao and Wanchoo J.J.).

But Das, C.J. and B. P. Sinha, J. expressed "We desire to guard ourselves against being understood as accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitution law. A post-Constitution law may infringe either a Fundamental Right conferred on citizens only or a Fundamental Right conferred on any person, citizen or non-citizen. In the first case the law will not stand in the way of the exercise by the citizens, but will *qua* the citizens, throw a shadow on the law which will nevertheless be on the statute book as a valid law binding on non-citizens and if that shadow is removed by a constitutional amendment the law will be immediately applicable

1. A.I.R. 1958 S.C. 731. 2. A.I.R. 1959 S.C. 648.

even to the citizens without being re-enacted. Whether a post-Constitution law of the other kind namely which infringes a fundamental right guaranteed to all persons, irrespective of whether they are citizens or not and which therefore can have no operation at all when it is enacted, is to be regarded as a still born law as if it had not been enacted at all and therefore not subject to the doctrine of eclipse is a matter which may be open to discussion ".

When a legislation is impugned on the ground that it adversely affects rights guaranteed by Part III of the Constitution, it is the duty of courts to first ascertain whether the right claimed is one of the rights guaranteed and secondly whether the right is affected in a manner not warranted by the Constitution. Except where a statute deals with a purely beneficial subject such as the regularisation of titles acquired under Bhoodan, a statute is bound to affect personal rights so called or rights to property or office[3].

Art. 13 does not abridge any vital limb of the Constitution. It is inserted *ex abundanti cantela*[4]. The Fundamental Rights are binding as directly valid law and no legislation and no administrative edict or Governmental rescript which is in violation of them can have any legal force or validity[4].

In *Dwarka Nath Tewari* v. *State of Bihar*[5] it was posited that Art. 182 of the Bihar Education Code was not 'Law'. It was no more than a mere administrative order or rule. So its provision for withdrawal or withholding of recognition in case the managing committee of a school does not carry out the directions of the Board of Secondary Education, has not the force of law and cannot deprive the managing committee of its rights in the properties of the school which is under its management.

Doctrine of Waiver of Fundamental Rights.

In *Basheshar Nath* v. *Commissioner of Income Tax* etc.,[6] the doctrine of waiver of Fundamental Rights was considered by the Supreme Court. Their Lordships said in unequivocal terms : "The preamble to our Constitution, Article 13 and the language in which the Fundamental Rights have been enacted lead to one conclusion and one conclusion only that whatever be the position in America, no distinction can be drawn here as has been attempted in the United States of America between the Fundamental Rights which may be said to have been enacted for the benefit of the individual and those enacted in public interest or on grounds of public policy. Ours is a nascent democracy and situated as we are socially, economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the Fundamental Rights which have been for the first time enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself e.g. in Articles 19, 33 and 34. But unless and until we find the limitations on such Fundamental Rights enacted in the very provisions of the Constitution there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the Fundamental Rights enshrined in Part III of the Constitution. Part III reflects the attempt of the Constitution-makers to reconcile individual freedom with State control. While in America this process of reconciliation was allowed to be evolved by the course of judicial decisions, in India the

3. *C. N. Subramanya Ayyar* v. *N. Dharmalinga Padayachi* I.L.R. (1958) Mad. 932: A.I.R. 1958 Mad. 608.
4. *Pandurang Kashinath Mose* v. *Union of India* A.I.R. 1959 S.C. 134. A.I.R. 1950 S.C. 27 explained and relied on.
5. A.I.R. 1959 S.C. 249.
6. A.I.R. 1959 S.C. 149.

Fundamental Rights and their limitations are crystallised and embodied in the Constitution itself; while in America a free hand was given to the judiciary not only to evolve the content of the right but also its limitations, in the Indian Constitution, there is not much scope for such a process. The court cannot therefore import any further limitations on the Fundamental Rights other than those contained in Part III by any doctrine such as 'waiver' or otherwise. It is not open to a citizen to waive his Fundamental Rights conferred by Part III of the Constitution. The Supreme Court is the ultimate protector of the Fundamental Rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights".

But the above opinion delivered by the majority[7] was dissented by S. K. Das, J., who said, "There is no such vital distinction between the provisions of the American Constitution and those of our Constitution as would lead one to the conclusion that the doctrine of waiver applies in respect of constitutional rights guaranteed by the American Constitution but will not apply in respect of Fundamental Rights guaranteed by the Indian Constitution. Where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals".

Though there is some force in the observations of the dissenting Judge, the present writer feels that the majority opinion is right. The right guaranteed under Part III is not merely for the individual as an individual but to him as part of the machinery of the State on whom is cast the duty of implementing the Fundamental Rights in public interest. Maybe, individuals on account of ignorance, poverty or undue pressure are persuaded by persons in authority or power to forego the rights. As a matter of policy the right to Equality (Articles 14 to 16), the seven freedoms assured in Article 19, the rights vouchsafed under Articles 20 to 31 and the right to constitutional remedy, have to be protected. If it is left to individuals to contract themselves out of it, much harm will result, not to speak of the big damage done to the bulwark of Fundamental Rights so sacredly guaranteed under Part III of the Constitution. It will cease to be fundamental and will be subjected to the ordinary notions of contract. In a nascent and undeveloped democracy as India these rights have to be protected absolutely, if the nation is to march onwards to the socialist utopia envisaged by the Constitution.

ARTICLE 14.

Article 14 and Special Trial Procedure.

We had already adverted to the various cases[8] wherein special trial procedure had been tested with the principles enunciated in Article 14. In *Budhan Chowdhry* v. *State of Bihar*[9] the problem was reassessed and tested. The appellants in this case had been prosecuted and convicted under Ss. 143 and 366,

7. S. R. Das, C.J., Kapur, Bagha-vathy and Subba Rao, JJ.
8. *State of West Bengal* v. *Anwar Ali* 1952 S.C.R. 234: A.I.R. 1952 S.C. 75: *Kaki Rani Rawat* v. *State of Saurashtra* A.I.R. 1952 S.C. 123: *Lachmandas Kewalram Ahuja* v. *State of Bom.* A.I.R. 1952 S.C. 235: *Quasim Razvi* v. *State of Hyderabad* A.I.R. 1953 S.C. 156: *Habeeb Mohammed* v. *State of Hyderabad* A.I.R. 1953 S.C. 287.
9. A.I.R. 195 S.C. 191 : (1955) S.C.J. 163.

I.P.C. by a magistrate specially empowered under Sec. 30. Under the latter section warrant procedure was adopted with the result the committal procedure followed by trial in sessions with the aid of jury was denied to them, while persons prosecuted under the same provisions of the I. P. C. would be normally tried in the latter way. The plea of the appellant that their rights under Art. 14 were violated was negatived by the Supreme Court in the instant case. Mere classification or the discretionary exercise of judicial power under Sec. 30, could not offend the Equality clause unless the classification itself was unreasonable or the discretion was exercised malafide.

The court observed that there was an obvious classification on which this Section 30 was based, namely, that such power may be conferred on specified Magistrates in certain localities only and in respect of some offences only, namely all offences other than those punishable with death. The Legislature understands and correctly appreciates the needs of its own people which may vary from place to place. A classification may be based on geographical or territorial considerations. The liability to be tried under Sec. 30 falls on all alike subject to the discretionary power being used bonafide by the magistrate. The ultimate power of decision lies with a judicial authority like a magistrate and not with the executive authority. The judicial discretion can be expected to be exercised on the facts and circumstances of each case. Unless malafides is imputed and an element of intentional and purposeful discrimination is shown, the exercise of the discretion under Sec. 30 cannot offend the equal treatment clause in Art. 14. While Art. 14 forbids class legislation it does not forbid reasonable classification for the purpose of legislation. The two tests are: (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.

The above two principles arose from the concurring and dissenting opinions Das J. who concurred with the majority opinion held that the words 'speedier respectively of Das J. and Patanjali Sastri C.J. in state of *W. B.* v. *Anwar Ali*[10]. trial' contained in the preamble to the West Bengal Special Court Act, 1950, was 'vague, uncertain and elusive' and that it could not form a rational basis for classification. S. 5 (1) of the Act was held invalid as it left the selection of cases entirely to the discretion of the State Government. It must be noted further that there was no scope of judicial review of the exercise of that discretion in *Anwar Ali's* case while in *Budhan Chaudhry's* case the law provides for revision by superior court of orders passed by the subordinate court. Whereas in *Anwar Ali's* case the discrimination was deemed to be implicit in the exercise of unfettered discretion by the executive, in *Budhan Choudhry's* case the discretion was conferred on a judicial authority. This makes for all the difference. To make this effective there is quite a need that there ought to be complete separation of the executive and judiciary. This has been achieved in Madras State. The grant of discretionary power under Sec. 30, Cr. P.C. in 'non-separation' areas, may not, however, be sound.

But it cannot be denied though the discrimination can be justified on the ground of a valid exercise of judicial discretion under Sec.

10. A.I.R. 1952 S.C. 75 : 1952 S.C.R. 234.

30, yet it cannot be denied that there is discrimination when a selection is made, when some persons charged with the same offences are tried in one court under one procedure while others of the same category, are tried in a different court with different procedure. This view is sought to be countered in *Budhan Chaudhry's* case by the answer that it is a justifiable discrimination sanctioned by a sound exercise of judicial discretion in the matter of picking out cases for action under Sec. 30.

Is Sec. 193, Cr. P. C., hit by Art. 147.

The Allahabad High Court in *Babu Ram and others* v. *State*[11] following the principles laid down by the Supreme Court in *Pannalal Binjraj* v. *Union of India*[12] held that as the power under Sec. 193 (2), Cr. P.C. is exercised by a judicial authority and since that power is further subject to the classification implied therein, it is perfectly constitutional. In *Pannalal Binjraj's* case the authority exercising the power under Sec. 5 (7-A) of the Income Tax Act was of a quasi-judicial nature. The Supreme Court had held in the latter case : "The power which is vested in the Commissioner of Income Tax or the Central Board of Revenue as the case may be under Sec. 5 (7-A) of the Act is not a naked and arbitrary power unfettered, unguided or uncontrolled so as to enable the authority to pick and choose one assessee out of those similarly circumstanced thus subjecting him to discriminatory treatment as compared with others who fall within the same category. The power is guided and controlled by the purpose which is to be achieved by the Act itself, viz., the charge of income tax, the assessment and collection thereof of the tax. A wide discretion is given to the authorities concerned for the achievement of the purpose, in the matter of the transfer of the cases of the assessees from one Income Tax Officer to another and it cannot be argued that such power which is vested in the authorities is discriminatory in its nature ".

The Allahabad High Court opined that the aforesaid observations of the Supreme Court apply *mutatis mutandis* to Sec. 193 (2) of the Code of Criminal Procedure. In the latter case the power is given to a regular judicial authority a Sessions Judge to transfer a case to an Assistant Sessions Judge. This is not a naked or arbitrary power since there is a valid classification implicit in it which controls the exercise of that power, the classification being based upon the question of sentence which in the opinion of a Sessions Judge is likely to be imposed in a particular case.

Do Ss. 6 and 17 (1), Land Acquisition Act Contravene Art. 14 ?

In *R. L. Aurora* v. *State of U.P.*[13] it was held that the power vested by Sec. 6 of the Land Acquisition Act in the State Government is not an arbitrary or unfettered power. Though it is true that the phrase 'for a public purpose or for a company' used in Sec. 6 and other sections of the Act suggests that the acquisition of land for a company need have no relation to any public purpose, but all proceedings under the Act for the acquisition of land for a public purpose or for a company begin with the issue of a preliminary notification under Sec. 4 which speaks of 'any public purpose'. Under Sec. 38 of the Act the Appropriate Government can authorise any officer of the company to exercise the powers conferred by Sec. 4 which can only mean acquisition for a public purpose. So section 6 is *intra vires* of Art. 14. It may be stated that

11. A.I.R. 1958 All. 838.
12. A.I.R. 1957 S.C. 597 : 1957 S.C.R. 233.
13. A.I.R. 1958 All. 872 : relies on A.I.R. 1957 S.C. 397.

Sec. 17 (1) and (4) confer an arbitrary power on the State Government to determine when a state of urgency exists and thus to deprive a person of his right under Sec. 5-A to object to the acquisition of his property. But as decided in the instant case[13] land can be acquired over for a company only when such acquisition is for a public purpose. In this background the urgency which in the opinion of the State Government must exist before it can declare under sub-section (4) that the provisions of S. 5-A. shall not apply, means an urgency in the public interest. The powers are, therefore, not unfettered and do not contravene Article 14.

Reasonableness of Tenancy Acts.

The Madras High Court held in *C. N. Subramanya Ayyar* v. *N. Dharmalinga Padayachi*[14] that the Tanjore Tenants and Pannaiyals Protection Act, 1952, the Madras Cultivating Tenants Protection Act 1955 as amended by Madras Act XIV of 1956 and the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 represent a valid exercise of the State's legislative power under Art. 246 and item 18 of List II of seventh schedule of the Constitution. They do not offend the concept of equal protection of laws under Art. 14 nor the rights vouchsafed under Art. 19 (1) (f). The restrictions fall within the ambit of Art. 19 (5). In order that the legislature of a State may enact legislation extending the term of a tenant of land beyond the period fixed by the contract of tenancy it is not necessary that there should be a situation which can be called an emergency in the relations of such land-owners and tenants[15]. The right which a landowner has to evict a tenant on the expiry of his term under the contract of tenancy is vested in the land-owner under the general law of contracts and principles enunciated in the Transfer of Property Act. But the Legislature has the power to modify or curtail for the benefit of the tenant (included in the term in ex-tenant) rights which are vested in the land-owner under the general law and the Transfer of Property Act. It was further held[14] that restrictions imposed on land owners for the benefit of tenants cannot be regarded as unreasonable or beyond the competence of the Legislature on the mere ground that the restrictions deprive the land-owner of certain antecedent vested rights[16]. The denial to land-owners in the State of Madras of the right to evict their tenants for a period of three or four years cannot, in the circumstance, be considered as an unreasonable restriction of their rights[14]. Fixing or directing the fixation of fair rent is part of the pattern of tenancy legislation in India and hence the Madras Cultivating (Payment of Fair Rent) is not an unreasonable exercise of the power.

Equal Protection and Equality before Law.

In *Ahmed Moideen* v. *Inspector 'D' Division*[17] constitutionality of the Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) was upheld as not offending Art. 14. The statute took away the powers of High Court to try sessions case on original side and vested it in the Sessions Court in the City of Madras created by Act 34 of 1955. The century-old right of citizens of Madras to have sessions cases committed against them to be tried by the High Court on the original side was held not to be inviolable. On the

14. A.I.R. 1958 Mad. 608 : I.L.R. (1958) Mad. 932.
15. *Ibid.* It was further stated that the English cases *Block* v. *Hirsch* (1920) 65 Law Edn. 865 and *Chastleton Corporation* v. *Sinclair* (1923) 6 Law Edn. 841 are not part of the Constitutional Law of India.
16. *Ibid.*
17. A.I.R. 1959 Mad. 261.

other hand, it was held that Act 34 of 1955 was really conducive to the doctrine of Equal Protection of Law and Equality before law. If a person commits murder in Poonamallee he could have been tried even before Act 34 of 1955 by the Sessions Judge, Chinglepet. It is not unjust to enact that the Sessions Judge of Madras should try a person who commits a murder on the Poonamallee High Road, within the original jurisdiction limits in Madras city.

Does 'any person' in Art. 14 include corporations?

Under the General Clauses Act[18], 'any person' includes natural or artificial person. Aliens can claim equal protection in India just as in America[19]. But that does not mean that aliens can claim the same rights e.g., right to vote (Art. 326), right to offer (Art. 16) right to freedoms (Art. 19) etc. The guarantee of equal protection is available to artificial persons or corporations[20]. In America while corporations are not citizens, the State can discriminate between corporations which are indigenous and which are foreign. But once a foreign concern is allowed to do business in a State, then it must be assured equal protection[21]. In *R. M. Seshadri* v. *Second Addl. I. T. Officer*[22] it was pointed that Art. 14 includes not only human beings but also juristic persons such as corporations. But the State in its sovereign power can insist on foreign corporations to take out a licence as a condition precedent to their doing business. Conditions may be imposed in the licence[23]. But corporations may be classified. There can be discrimination between national or domestic and foreign corporations[24]. Corporations function under a grant or licence and they can be restricted in the exercise of their rights to the terms of the licence.

Discrimination.

There can be no discrimination in law when the same Act constitutes offences under two statutes, e.g. 488, I. P. C. or Sec. 4 of the Agricultural Produce (Grading and Marking) Act[25]. In each of these cases the magistrate who takes cognizance of the offence on receipt of a complaint is not only free but bound under Sec. 19 (1) (a) or Sec. 196 (1) (b), Cr. P. Code to take cognizance of both these offences which these acts constitute.

It is in the nature of things impossible that all laws should have universal application and that the legislature has to be constantly engaged in devising laws to suit various classes of persons and to meet differing circumstances. Classification is therefore a necessary part of legislation and does not as such imply any discrimination intended to be prohibited by the Constitution[26]. Thus in the Employees Provident Funds Act the statute lays down the principle and policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification as indicated in S. 1 (3) and (4)[27]. So far as the factories which can be brought within the ambit of Sec. 5 of the Act are concerned, the principle and the policy have been clearly laid down by Sec. 1 read with Schedule I and the definition of 'Industry' contained in Sec. 2 (1) of the

18. *See* S. 3 (42) of the Act.
19. *Traux* v. *Raich* (1915) 239 U.S. 33 : *Yickwo* v. *Hopkins* (1886) 118 U.S. 356.
20. *Chiranji Lal* v. *Union of India* 1950 S.C.R. 869.
21. *Hanover Ins. Co.* v. *Hardinge* 272 U.S. 494.
22. A.I.R. 1954 Mad. 806.
23. *Lincoln National Ins. Co.* v. *Read* (1945) 325 U.S. 673.
24. *Power Manufacturing Co.* v. *Saunders* (1927) 274 U.S. 490.
25. *Chattey Lal* v. *State* A.I.R. 1959 Cal. 32.
26. *Shri Harish Chand* v. *Collector of Amritsar* A.I.R. 1959 Punj. 19 (F.B.).
27. *Hindustan Electric Coy. Ltd.* v. *Regional Provident Fund Commissioner, Punjab* A.I.R. 1959 Punj. 27.

Act . Under Sec. 19 of the Act the discretion is given in the first instance to the Central Government or the State Government. The fact that the power of delegation is to be exercised by the Government itself is a safeguard against the abuse of such power[27].

There can be a valid classification of distributors as co-operative societies and other dealers[28]. The co-operative societies are comprised of members who are tobacco cultivating ryots. While in the case of the co-operative society, profits would ultimately go to the members, in the case of a private dealer profits would go into his own pocket[28].

The State has a wide latitude and discretion in classifying persons, objects and the like for purposes of legislation. Taking for instance Ss. 262 to 264, Cr. P. Code, it will be manifest that the only departure from ordinary trials in the case of a summary trial is that, in non-appealable cases, no charge need be framed and no evidence need be recorded, while in appealable cases a substance of the evidence has to be recorded[29]. The right of cross-examination of witnesses for the accused does exist in cases covered by Ss. 260, 263 and 264. There is no denial of fair trial to an accused who is tried summarily. The discretion of judicial officers is not arbitrary and the law provides for revision by superior courts. The object is to ensure speedy trials of persons committing all the offences in that group. As there is a nexus between the object and the basis of the classification, the equal protection clause in Art. 14 is not violated[29].

But if there is no such nexus and the powers given are arbitrary, Art. 14 will get attracted. Thus in *Smt. Shama Bai* v. *State of U.P.*[30] Sec. 20 of the Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956) was construed (obiter) as violating Arts. 14 and 19. Very wide powers are given under Sec. 20 to a magistrate to remove any woman or girl who is a prostitute from any place within the limits of his jurisdiction if he considers that it is necessary to do so in the interests of the general public and also to prohibit them from re-entering it again. The Section contains nothing to guide the magistrate in deciding which prostitute to remove outside his jurisdiction and which not to remove. The expression 'necessary in the interest of the general public' by itself is too vague, uncertain and elusive to form a rational basis for the discrimination made. The Section hits also Art. 19 (1) (g) (d) and (e). The result of an order removing a prostitute from a city or area where she is carrying on her profession or trade and prohibiting her from re-entering the same for an indefinite period or for all times would lead to her not being able to exercise the rights conferred under Art. 19 (1) (g) (d) and (e).

The Employees Provident Funds Act cannot be held as discriminatory on the ground that Art. 16 thereof makes the provision inapplicable to the factories belonging to Government or local authority[31].

In *Haridas Mundhra* v. *State*[32] it was pointed out that Sec. 14, Cr. P. C. is not discriminatory. The special magistrate under Sec. 14 has to try the case entirely under the normal procedure. There is no inherent right in an accused to ask that the court should sit at a particular place or in a particular building. Mere transfer of place of sitting does not amount to a deviation in procedure[32].

28. *K. V. Subbiah Choudhry* v. *G. Parandamiah*, 1958 Audh. L.T. 587.
29. *Bindeshwari Mandal* v. *Birju Mandal* A.I.R. 1959 Pat. 46: follows A.I.R. 1952 S.C. 75 and A.I.R. 1955 S.C. 191.
30. A.I.R. 1959 All. 57.
31. *M. P. Industries Association* v. *Regional Provident Fund Commissioners, Bombay* A.I.R. 1959 Bom. 60. follows A.I.R. 1954 S.C. 78.
32. A.I.R. 1959 All. 82.

But a provision like Sec. 135 (3) of the U. P. Municipal Act was held *ultra vires* as it debarred a person, if a municipal tax is demanded from him, from seeking redress from the court by showing that the tax was unlawfully imposed[33]. To make the State Government under S. 135 (3) the sole judge of whether or not the provisions of the Act was complied with was held arbitrary.

Sec. 198 B, Cr. P. C. was held *intra vires* of Art. 14[34]. Similarly, Ss. 4 and 5 of the Hindu Marriage Act XXV of 1955 were held as not offending the provisions of Art. 14, 15 or 25[35]. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the courts of law to sit in judgment upon that decision.

The Andhra High Court held[36] upheld the increase in court fee in writ petitions as *intra vires* of Art. 14. Neither Art. 14 nor Art. 229 takes away the power of State Legislature to make laws in regard to payment of court fee vide item 66 in List II and item 47 in List III of Schedule VII of the Constitution. It is a fee and not a tax and the consideration for the fee is the hearing given to courts. Though the increase in court fee in regard to writ petitions is many times more than in the case of other proceedings, it being a question of legislative policy cannot be impugned in a court of law[36].

In *Messrs. D. S. & G. Mills* v. *The Union of India*[37] a notification under Sugar Control Order (1955) Clause 5 read with Essential Commodities Act (1955) Sec. 3 was impugned as offending Art. 14 on the ground that fixing prices for the Punjab, U. P. and North Bihar only and not for the other parts of India was discriminatory. Though in form prices are fixed for factories only in Punjab, U. P. and North Bihar, in effect they are fixed for the whole of India, once the production of these three regions which are surplus in sugar is controlled.

Cow Slaughter Case.

In *M. H. Qureshi* v. *State of Bihar*[38] the Supreme Court reiterated scope and effect of Article in the light of its prior decisions. The classification may be founded on different bases, namely geographical or according to objects or occupations, or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Decisions are clear that there is always a presumption in favour of the constitutionality of an enactment. The court must presume that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times, and may assume every state of facts which can be conceived existing at the time of legislation[39].

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33. *Raghavendra Kripal* v. *Municipal Board,* A.I.R. 1959 All. 192.
34. *R. Sankar* v. *State,* A.I.R. 1959 Ker. 100.
35. *Haisnam Baruniton* v. *Thokcham Ningol* A.I.R. 1959 Manipur 20.
36. *Manyamma* v. *Municipal Commissioner, Hyderabad* A.I.R. 1959 Andh. Pra. 271: A.I.R. 1955 S.C. 191 applied.
37. A.I.R. 1959 S.C. 627.
38. A.I.R. 1958 S.C. 627.
39. *Chiranji Lal Choudhury* v. *Union of India* A.I.R. 1951 S.C. 41 and later cases ending with *Rama Krishna Dalmia* v. *Justice Tendolkar* A.I.R. 1958 S.C. 538.

In the light of the above factors their Lordships examined the impugned Acts (The Bihar Preservation and Improvement of Animals Act 2 of 1956, The U. P. Prevention of Cow Slaughter Act 1 of 1956, and M.P. Acts 23 of 1951 and 10 of 1956 amending the C. P. and Berar Animal Preservation Act 52 of 1949). These Acts were made by the States in discharge of the obligations imposed on them by Art. 48. The legislatures enacted them in the exercise of the powers conferred on them by Art. 246 read with entry 15 in List II of the Seventh Schedule. The objects sought to be achieved by the impugned Acts are the preservation, protection and improvement of livestock. Cows, bulls, bullocks and calves of cows are no doubt the most important cattle for the agricultural economy of the country. Female buffaloes yield a large quantity of milk and are, therefore, well looked after and do not need as much protection as cows yielding a small quantity of milk require. As draught cattle male buffaloes are not half as useful as bullocks; sheep and goat give very little milk compared to the cows and the female buffaloes and have practically no utility as draught animals. These different categories of animals being susceptible of classification into separate groups on the basis of their usefulness to society, the butchers who kill each category may also be placed in distinct classes according to the effect produced on society by the carrying on of their respective occupations. Indeed, the butchers, who kill cattle form a well defined class which distinguishes them from those who kill goats and sheep and this differentia which places them in a well defined class has a close connection with the object sought to be achieved by the impugned Act, namely the preservation, protection and improvement of livestock. Their Lordships held that the attainment of these objectives may well necessitate that the slaughterers of cattle should be dealt with more stringently than the slaughterers of, say, goats and sheep. The impugned Acts, therefore, have adopted a classification on sound and intelligible basis and can quite clearly stand the test laid down in the decisions of the Supreme Court. The impugned Acts were held *intra vires* of Article 14.

A classification of cases arising under Art. 14.

We have already mentioned the general principles laid down as the guiding factors in the application of Article 14 while adverting to the Supreme Court case in *Ramakrishna Dalmia* v. *Justice Tendolkar*[40]. A classification has been attempted in the said case of the various judicial decisions to which those principles were applied. His Lordship the Chief Justice (Mr. S. R. Das) said : " . . . . . a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution may be placed in one or the other of the following five classes :—

1 A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to be brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular

40. A.I.R. 1958. S.C. 539.

person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests the court will uphold the validity of the Law as it did in *Chiranjit Lal* v. *Union of India*[41], *State of Bombay* v. *F. N. Balsara*[42], *Kedar Nath Baloria* v. *State of W. Bengal*[43], *V. M. Syed Mohammad and Company* v. *State of Andhra*[44] *and Bhudan Choudhry* v. *State of Bihar*[45].

2. A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis or classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination as it in *Ameerunnissa Begum* v. *Mahboob Begum*[46] and *Rama Prasad Narain Sahi* v. *State of Bihar*[47].

3. A statute may not make any classification of the person or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to Government so as to enable it to discriminate between persons or things similarly situate and that therefore the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law as it did in *State of West Bengal* v. *Anwar Ali Sarkar*[48], *Dwarka Prasad* v. *State of Uttar Pradesh*[49], and *Dhirendra Kumar Mandal* v. *Superintendent and Remembrancer of Legal Affairs*[50].

4. A statute may not make a classification of the person or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classifications; the court will uphold the law as constitutional as it did in *Kathi Raning Rawat* v. *The State of Saurashtra*[51].

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41. A.I.R. 1951 S.C. 41: 1950 S.C.R. 869.
42. A.I.R. 1951 S.C. 318: 1951 S.C.R. 682.
43. A.I.R. 1953 S.C. 404: 1954 S.C.R. 30.
44. A.I.R. 1954 S.C. 314: 1954 S.C.R. 1117.
45. A.I.R. 1955 S.C. 191: 1955-1, S.C.R. 1045.
46. A.I.R. 1953 S.C. 91: 1950 S.C.R. 404.
47. A.I.R. 1953 S.C. 215: 1953 S.C.R. 1129.
48. A.I.R. 1952 S.C. 75: 1952 S.C.R. 284.
49. A.I.R. 1954 S.C. 224: 1954 S.C.R. 808.
50. A.I.R. 1954 S.C. 424: 1955-1 S.C.R. 224.
51. A.I.R. 1952 S.C. 235: 1952 S.C.R. 425.

5. A statute may not make a classification of the person or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the person or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been laid by this court e.g. In *Kathi Raning Rawat* v. *The State of Saurashtra*[51] that in such a case the executive action but not the statute should be condemned as unconstitutional.

Reasonable classification.

It is settled law that Art. 14 permits classification for legislative purposes provided such classification is based on some differentia having a reasonable relation to the object and purpose of the law in question[52]. Thus in a Calcutta case, classification such as forward contracts and ready delivery contracts under the Forward Contracts (Regulation) Act 1952 was held *intra vires of* Art. This division of all contracts for purchase and sale aims at prohibition of speculation in future. Thus, S. 18 (1) excludes non-transferable specific delivery contracts from the provisions contained in Chapters III and IV of the Act.

In *P. V. Siva Rajan* v. *Union of India*[53] the Supreme Court upheld the classification of traders under The Coir Industry Act. The main object of the Rules (Rr. 18, 19) is to improve the anomalies and malpractices prevailing in the export trade of coir commodities and to put the said trade on a firm and enduring basis in the interest of national economy. The rule granting exemption from the operation of some of the relevant tests to co-operative societies was intended to encourage small traders to form co-operative societies and carry on export on behalf of such societies.

The U. P. Consolidation of Holdings Act (5 of 1954) as amended by U. P. Act 16 of 1957 was sustained under Art. 14 by the Supreme Court in *Attar Singh* v. *State of U. P.*[54]. Consolidation was considered a boon to the villagers. It would result in improving agricultural production. Some kind of compulsion would be necessary to achieve this object and as such Ss. 29-B and 49 of the Act were held *intra vires*. The object of the Act was to allot a compact area in lieu of scattered plots to tenure-holders so that large-scale cultivation may be possible with all its attendant advantages. As to constitutionality of S. 6 which gave power to the State Government at any time to cancel the declaration made under Sec. 4 in respect of the whole or any part of the specified area, the question was left open in the instant case as it did not directly arise for decision in the case.

In *Gopichand* v. *Delhi Administration*[55] the Supreme Court upheld the vires of Sec. 36 (1) of the East Punjab Safety Act. The effect of the impugned provision was that after an area was declared to be a dangerously disturbed area offences specified in it would be tried according to summons procedure even though they have ordinarily to be tried according to warrant procedure. It was held that the object of the Act was obviously to ensure public safety and maintenance of public order and there could be no doubt that the speedy trial of the

52. *Raymon Co. (India) Private Ltd.* v. *Waverly Jute Mills Co. Ltd.*, A.I.R. 1959 Cal. 89.
53. A.I.R. 1959 S.C. 556.
54. A.I.R. 1959 S.C. 664.
55. A.I.R. 1959 S.C. 609.

specified offences had an intimate rational relation or nexus with the achievement of the said object. The classification of dangerously disturbed areas and others was considered rational based on an intelligible differentia.

In *Western India Theatres* v. *Cantonment Board*[56] the Supreme Court in an obiter observed, "It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situated in fashionable or busy localities where the number of visitors is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some locality where the visitors are less numerous or financially in less affluent circumstances, for the two cannot, in those circumstances, be said to be similarly situate". But it appears as if the plea of reasonable classification on geographical or regional basis and now on the basis of poor or rich area in a city can make a discriminatory act not discriminatory! In the instant case, if a poor man visits a cinema in the rich area while the cinema house may have its own rates will it be reasonable to tax the joy-gatherer with more Government tax than he would be if he went to a cinema in the poor area. Too much dilution of the right guaranteed under Article 14 at the altar of classification helped by the mercurial yardstick of reasonableness, does not appear to be wholesome. [For fuller discussion see Chapter XIII *infra.*]. It may be apposite to mention the recent case of *Hukum Chand Mills* v. *The State of M.P. and others*[57] where the Legislature validated illegal assessments made by wrong authorities by enacting the M. B. Taxes on Income (Validation) Act, 1954 whereby the Madhya Bharat assessees were deemed a class by themselves. The cost of refund and reassessment was said to have been saved thereby.

Waiver of right under Art. 14.

The question of waiver of Fundamental Rights assumed importance in *Basheshar Nath* v. *I.T. Commissioner* etc.[58], decided recently by the Supreme Court. The question was whether a settlement made under Sec. 8-A of the Taxation on Income (Investigation Commission) Act, 1947 after 26th January, 1950 (when the Constitution came into force) and the orders passed thereon by the Union Government were valid? Can the tax evader after submitting to such settlement take advantage of a subsequent decision of the Supreme Court in Muthia's case (A.I.R. 1956 S. C. 269)[59], which had declared Sec. 5 (1) of the said Act as unconstitutional, and urge that since Sec. 8-A is the consequence of the proceeding under Sec. 5 (1), the settlement itself is invalid? Can he not also plead that there had been a breach of the assessee's fundamental right by subjecting him to a discriminatory procedure laid down in the impugned provision [Sec. 5 (1)] of the said Investigation Act? And since it is a fundamental right he cannot in law waive it and *a fortiori* the settlement already arrived at under Sec. 8-A is void? In the instant case the Government was a loser involving a huge amount if the contention of the petitioner was allowed?

The majority opinion in the instant case was in favour of the petitioner. The special leave to appeal under Art. 136 was allowed and the order of the Income Tax Commissioner was set aside. S. A. Das, C.J., and Kapur, J., stated in their opinion, "Article 14 is, in form an admonition addressed to the State and does not directly purport to confer any right on any person as some

56. A.I.R. 1959 S.C. 582.
57. A.I.R. 1959 M.P. 195.
58. A.I.R. 1959 S.C. 149.
59. *M. C. T. Muthia Chettiar* v. *Commr. of I. T.* 1955-2 S.C.R. 1247: A.I.R. 1956 S.C. 269.

of the other articles e.g., Art. 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this Article is not limited to citizens but is available to any person within the territory of India. In the third place it is to be observed that by virtue of Article 12, 'the State', which is, by Article 14 forbidden to discriminate between persons, includes the Government and Parliament of India and the Government and the Legislature of each of State and all local or other authorities within the territory of India or under the control of the Government of India. Article 14 is, therefore, an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. Thus Article 14 protects us from both legislative and executive tyranny by way of discrimination. It seems to be absolutely clear on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can by any act or conduct relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may, not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this Constitutional mandate directed to the State."

Their Lordships discussed the prior decision on waiver in *Behram Khurshid Pesikaka* v. *State of Bombay*[60], Venkatramayyar, J., put it tersely in the latter case[61]; "The question is, what is the legal effect of a statute being declared unconstitutional? The answer to it depends upon two considerations. Firstly, does the constitutional prohibition which has been infringed affect the competence of the legislature to enact the law or does it merely operate as a check on the exercise of a power which is within its competence; and secondly, if it is merely to check whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on the grounds of public policy. If the statute is beyond the competence of the legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be the position when a limitation is imposed on the legislative power in the interests of the public, as for instance the provision in Chapter XIII of the Constitution, relating to inter-state trade and commerce. But when the law is within the competence of the legislature and the unconstitutionality arises by reason of the repugnancy enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well settled[62] ..... The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under Art. 19 (1) (f) are enacted for the benefit of owners of properties and when a law is found to infringe

60. A.I.R. 1955 S.C. 123 : 1955-1 S.C.R. 613.
61. *Ibid.* p. 139 of A.I.R. : p. 638 of S.C.R.
62. *Vide* Cooley on Constitutional Limitations Vol. I pp. 368 to 371; Willis on Constitutional Law at pp. 524, 531, 542 and 558; Rottschaffer on Constitutional Law at pp. 28, 29,30.

that provision it is open to any person whose rights have been infringed to waive it....."

This distinction of Venkataramayyar, J., as to a case where the fundamental right affects only the individual and where it affects the public was not accepted by Mahajan, C.J., when *Behram's case* was reviewed by him. Mukherjee, Vivian Bose and Ghulam Hasan, JJ., concurred with the Chief Justice when he said :

"In our opinion the doctrine of waiver enunciated by some American judges in construing the American Constitution cannot be introduced in our Constitution without a further discussion of the matter..... Without finally expressing an opinion on this question, we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political, liberty of thought, expression, belief, faith and worship ; equality of status and opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles *inter alia* Arts. 15 (1), 20 and 21 makes the proposition plan. A citizen cannot get discrimination by telling the State—'you can discriminate' or get convicted by waiving the protection given under Articles 20 and 21".

S. R. Das,. C.J., in the instant case of *Baseshar Nath* confined therefore his attention as to the fact whether Art. 14 be affected the public in general. The answer was in the affirmative as already stated[63]. Bhagvati, J., was more emphatic and would consider the doctrine of waiver as inapplicable to any fundamental right[64]. He said, "It will be seen that under Art. 13 (2) an admonition was administered to the State not to enact any law which takes away or abridges the right conferred by this part and the obligations thus imposed on the State enured for the benefit of all citizens of Bharat alike in respect of all fundamental rights..... No distinction was made in terms between the fundamental rights said to have been enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy".

Justice Bhagvati rightly calls for a departure from the following American doctrine. As Willis states[65]. "In the United States Constitution an attempt has been made to strike a proper balance between personal liberty and social control through the express limitations written into the Constitution and interpreted by the Supreme Court, by implied limitations created by the Supreme Court, and by the development of the Governmental power of regulation, taxation and eminent domain by the Supreme Court".

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63. Note, His Lordship distinguished the cases of *Laxmanappa Hanumantappa* v. *Union of India* A.I.R. 1955 S.C. 3, *Gopal Das Mohta* v. *Union of India* A.I.R. 1955 S.C. 1 and *Babu Rao Narayana Rao Sanas* v. *Union of India* A.I.R. 1955 S.C. 257, as not relevant to the question of Waiver. *See* A.I.R. 1959 S.C. at P. 159.
64. *See* A.I.R. 1959 S.C. at p. 161 *See* also our *comment* supra under Art. 13.
65. *Constitutional Law*, at p. 477,

But in the Indian Constitution a balance is struck between a written guarantee of individual rights and the collective interests of the community by making provisions in that behalf in Part III of the Constitution[66]. The admonition of Patanjali Sastri, C.J., vis-a-vis American law may be apposite to quote : "These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time their operation and application in the context of expanding American commerce and industry and we are of opinion that not much help can be derived from them in the solution of the problems arising under Art. 286 of the Indian Constitution".

There is no doubt statutory rights can be waived. With respect to what are called constitutional rights the waiver may be possible if it affects only the individual and not the public in accordance with American concept. As Baghavati, J., concludes, "But when the rights conferred are put on a high pedestal, and are given the status of fundamental rights, which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g. : Fundamental Rights which are enshrined in Part III of the Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto and other constitutional rights which are enacted in other provisions for instance in Arts. 265 and 286 and in Part XIII of the Constitution) they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen. The Constitution adopted by our founding fathers is sacrosanct and it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America".

Subba Rao, J., clarifies the position further in the instant case of Basheshar Nath[67]. The Fundamental Rights contained in Part III of the Constitution are really rights that are still reserved to the people after the delegation of rights by the people to the institutions of Government both at the Centre and in the States created by the Constitution. "Article 13 in clear and unambiguous terms, not only declares that all laws in force before the commencement of the Constitution and made thereafter taking away or abridging the said rights would be void to the extent of the contravention but also prohibits the State from making any law taking away or abridging the said rights". As Subba Rao, J., points out, "Part III is therefore enacted for the benefit of all citizens of India, in an attempt to preserve to them their fundamental rights against infringement by the institutions created by the Constitution, for without that safeguard, the object adumbrated in the Constitution could not be achieved. For the same purpose, the said Chapter imposes a limitation on the power of the State to make laws in violation of those rights. The entire part in my view has been introduced in public interest and it is not proper that the fundamental rights created under the various articles should be dissected to ascertain whether any or which part of them is conceived in public interest and which part of them is conceived for individual benefit. Part III reflects the attempt of the Constitution-makers to reconcile individual freedom with State control. While in America this process of reconciliation was allowed to be evolved by the course of judicial decisions, in India the fundamental rights and their limitations are crystallised and embodied in the Constitution itself..... I would, therefore, hold that the

66. Vide *Gopalan* v. *State of Madras* A.I.R. 1900 S.C. 27: A.I.R. 1952 S.C. 366 at p. 368.

67. *Vide* A.I.R. 1959 S.C. at pp. 178 to 185.

fundamental rights incorporated in Part III of the Constitution cannot be waived".

All the Articles 14 to 32 are not subject to waiver. Article 14 embodies the famous principle of equality before the law and equal protection of the laws and Arts. 15 to 18 and Art. 29 (2) relate to particular application of the rule. "If the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree to be discriminated. When one realises that unequal positions are occupied by the State and the private citizen, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of preferment give up his right. It is said that in such a case coercion or influence can be established in a court of law, but in practice it will be well nigh impossible to do so. The same reasoning will apply to Arts. 15 and 16. Article 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That Article in express terms forbids untouchability and obviously, a person cannot ask the State to treat him as an untouchable "[68].

The same position applies to Article 19. There can be no contingency where a citizen would be in a worse position than he was if he could not exercise the right of waiver. Maybe, a plausible argument is that a citizen should have the right of waiver in the matter of acquisition and disposal of property. But Article 19 does not compel a citizen to acquire, hold and dispose of property just as it does not compel a person to do any acts covered by the other six freedoms set out in Article 19 ..... There is an essential difference between the non-exercise of a right and the exercise of a right subject to the doctrine of waiver ..... the preservation of the rights under Art. 19 without any further engrafting of any limitations than those already imposed on the Constitution, is certainly in the interests of the public, for the rights are essential for the development of human personality in its diverse aspects". The learned judge dilates further[69] to demonstrate how Articles 20 to 32 also cannot be waived. In Art. 20 (3) the fundamental right is only that a person should not be compelled to be a witness against himself. That does not prevent him from giving evidence voluntarily. Art. 25 is conceived in public interest. Art. 31 also is based on public interest.

The dissenting view.

The dissenting view of Mr. Justice S. K. Das lay only on the question of waiver. While he differed on the legal application of the doctrine of waiver to fundamental right, he held however that on facts of the case there was no foundation to sustain that plea. But he stated:

"The true position as I conceive it is this: where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals".

This opinion is an obiter and appears difficult of acceptance. To constitute 'waiver' there must be an intentional relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver is contractual and is an agreement to release or not to assert a right while estoppel is a mere rule of evidence. His

68. Per Subba Rao J. A.I.R. 1959 S. C. at p. 181.

69. *Vide* p. 182 of A.I.R. 1959 S.C.

Lordship S. K. Das differed from the view of S. R. Das, C.J., and Kapur, J. that the fundamental rights under Art. 14 cannot be waived. He also differed from the opinion of Subba Rao, and Bhagvati, JJ. that none of the fundamental rights in Part III of the Constitution can be waived. Adverting to the word 'void' in Art. 13 which Mahajan, C.J., in Behram Khurshed Pessika's case[70] held was a clear mandate of the fundamental law prohibiting the State from making any laws which came into conflict with Part III of the Constitution, S. K. Das, J., said : "It seems clear to me that the article itself recognises the distinction between absence of legislative power which will make the law made by an incompetent legislature wholly void, and exercise of legislative power in contravention of a restriction or check on such power, which will make the law to the extent of the inconsistency or contravention . . . . . The mere use of the word 'void' in Article 13 does not necessarily militate against the application of the doctrine of waiver in respect of the provisions contained in Part III of the Constitution. Under the American Constitution also, a law made in violation of a constitutional guarantee is struck down because under Art. VI of that Constitution : 'the Constitution and the laws of the United States which shall be made in pursuance thereof . . . . . shall be the supreme law of the land'."

Adverting to the preamble and the Scheme of the Constitution of India, S. K. Das, J., while recognising the constitutional policy behind the provisions in Part III he wished to also give consideration to legislative policy. While it will be wrong to whittle down fundamental rights, the question should be to analyse the nature of the right guaranteed and to study the foundation on the basis of which the plea of waiver is raised. Firstly, a right granted by an ordinary statutory enactment can be certainly waived. Secondly, in respect to right granted by the Constitution (not Part III) e.g. : right relating to the services under the Union and the States in Part XIV, the Government servant can waive the benefit derived from those provisions. But in respect of provisions in Part XIII (trade, commerce and intercourse) since the nature of these rights rest on public interest, they cannot be waived. S. K. Das, J., would say these rights are in Part XIII and not Part III and that even in respect of the latter the same consideration as to whether the right waived is one of public interest is of paramount importance. Thus Articles 23 and 24 are in public interest. But is the right under Art. 31 in the interest of the individual and so also Art. 32? S. K. Das, J., puts the querry why can one not waive these rights[69]. His Lordship saw no distinction between the provisions of the American and those of our Constitution.

We hasten to add that his Lordship S. K. Das's reasoning lays emphasis on the nature of the right. Justice Subba Rao has in effect answered fully S. K. Das, J. We have no hesitation in stating that Art. 31 which prohibits the State from depriving a person of his property save by authority of law or to acquire any property without paying compensation is intended to protect the properties of person from arbitrary actions of the State. The article undoubtedly is conceived in public interest as also Art. 32. Part III contains all rights which are fundamental in the interest of the individual as a unit of the public. Public interest is the keystone of Part III and we would therefore agree with the reasonings of Subba Rao, J., in full. The stand taken by S. R. Das, C.J., has not answered the question fully and we have had ample help in this regard from the judgments of Bhagavati, J., and Subba Rao, J., which, we feel, has answered the question in fairly good measure.

70. *See* for full discussion A.I.R. 1959 S.C. 175 to 179.

ARTICLE 16.

In Ramesh Chandra v. State Government of U.P.[71] it was posited that the U. P. Government Servants' Conduct Rules under which a Government servant is liable to be removed for being a member of a political party do not offend Art. 16. For, it is of paramount importance that Government servants should be free from all political bias. Far from offending any fundamental right, these rules are fundamental obligations arising out of an implied contract entered into by a Government servant. It is in public interest this is so to safeguard the fair name of the services and increase its efficiency[71].

Art. 16 does apply to employment under State and hence there can be no arbitrary discrimination even in matters to which the provisions of Arts. 310 and 311 apply[72]. The article applies to temporary services also[72]. The guarantee extends to every citizen and every employment or appointment whether permanent or temporary. It is essentially a question not of the nature or tenure of the engagement but of the basic guarantee of equitable treatment assured by the Constitution. If the termination of service was on extraneous grounds the order is invalid[72].

ARTICLE 16 (2).

Clause (2) of Art. 16 applies with equal vigour to all posts under the State, permanent as well as temporary. It is not permissible to engraft limitations upon the fundamental rights enshrined in the Constitution[73]. In the instant case the petitioner who was appointed temporarily to act as compounder was later ousted from service on the sole ground that he is a non-Andhra having been born in North Arcot District. This was held *ultra vires* of Art. 16 (2)[73].

A contract for supply of milk to the Government hospital is not a contract of employment as contemplated under Art. 16 (1). No fundamental right is affected if the contract is cancelled and the co-operative society is given preference. A suit for damages can lie in such a case[74].

ARTICLE 19 (1) (a).

Freedom of speech.

In *State* v. *Ram Chander Sharma*[75] it was pointed out that public men and publishers of newspapers are within their rights particularly in a free country to vindicate public grievances[75]. Freedom of press, liberty of speech and action so far as they do not contravene the law of contempt are to prevail without let or hindrance. But at the same time the maintenance of dignity of the courts is one of the cardinal principles of rule of law in a free democratic country and when the criticism which may otherwise be couched in a language that appears to be mere criticism results in undermining the dignity of courts and courts of justice in the land, it must be held repugnant and punished. No court can look with equanimity on a publication which may have tendency to interfere with the administration of Justice[75]. The right of freedom of speech and expression does not embrace the freedom to commit contempt of court[76].

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71. A.I.R. 1959 All. 47.
72. *Pandurang Kashinath More* v. *Union of India* A.I.R. 1959 Bom. 134 : Distinguishes A.I.R. 1951 S.C. 97; A.I.R. 1953 S.C. 250 explained. Dissents from A.I.R. 1954 All. 343. *Sardar Iqbal Singh* A.I.R. 1958.
73. *Janikaraman* v. *State of Andhra Pradesh* 1959 Andh. L.T. 59-(1959) 1 An. W.R. 71.
74. *C. K. Achuthan* v. *State of Kerala* A.I.R. 1959 S.C. 490.
75. *State* v. *Ram Chander Sharma* A.I.R. 1959 Punj. 41.
76. *State of Bom.* v. *"M.P."* A.I.R. 1959 Bom. 182.

In *Ram Nandan v. State*[77] the Allahabad High Court struck down Sec. 124-A I. P. C. as *ultra vires*. The restrictions imposed by that section were too wide and could not be justified as being solely in the interests of public order. Under the Constitution democracy thrives by free discussion of the Government and its policies. Criticism of Government to any length short of creating disorder is permissible. No question of disaffection arises in a democracy where one has the right to change the Government of the day. As Sec. 124-A stands, even an intimate conversation or conversation with a person who is not likely to disturb public order is punishable. A tendency to disorder cannot be said to be inherent in 'disaffection'; there may be disaffection which has a tendency to disorder and there may at the same time be disaffection within the meaning of Sec. 124-A which has not that tendency. Hence Sec. 124-A could not be said to be a reasonable restriction in the interests of public order. The same holds good for the words 'hatred' and 'contempt' which are covered by the word 'disaffection' in Sec. 124-A. Further a change in the person holding office of the President or a Governor or a Minister does not mean a change in the Government established by law. A threat of changing the Government after previously altering the Constitution in such a manner as to permit a new system of Government cannot amount to a threat to the security of the State. The security of the State cannot be threatened by anything done in exercise of the powers conferred by the Constitution itself.

In the matter of Government service conduct rules and rules prohibiting demonstrations and strikes relating to their conditions of service, the Patna High Court held[78] that the restrictions are reasonable since they apply to only one class of the community namely employees in the Govt. civil service. The latter have a greater responsibility as they occupied a special status. It was considered as a question of balancing conflicting social interests—the social interests of protecting freedom of speech and freedom of association and the efficiency of the civil service as a disciplined body, in a democratic Society[78].

Parliamentary privilege and Art. 19 (1) (a).

We had already adverted to the case in what is popularly called the 'Searchlight Case': *Pandit Sharma* v. *Sri Krishna Sinha and others*[79]. In the Bihar Legislative Assembly during the budget session in May 1957 a member had made certain bitter allegations against the Minister as being influenced by a former Minister who was defeated in the general elections and who was made the Chairman of the Khadi Board. The Speaker had ordered certain remarks of the member against the former Minister, to be expunged from the records of the House. But Mr. M. S. P. Sharma, the Editor of 'Searchlight' published in the issue of 31-5-1957 the entire speech inclusive of the expunged portion under the caption 'Bitterest attack on the Chief Minister'. A question of privilege was raised on the floor of the House and nearly a year after the publication the Committee of Privileges of the House issued to the editor a general notice to show cause against the *prima facie* case of breach of privilege entered by the committee. The notice referred to the entire speech inclusive of the expunged portion. The petitioner filed a writ petition in the Supreme Court urging

77. A.I.R. 1959 All. 101 (F.B.) relies on A.I.R. 1950 S.C. 129.: A.I.R. 1951 Punj. 27 and A.I.R. 1947 P.C. 82. *See* A.I.R. 1957 S.C. 620. Dissents from A.I.R. 1954 Pat. 254 and A.I.R. 1951 All. 459. Vide commentary in Vol. I of this Book. No Supreme Court decision has yet been made on this point.
78. *Kameshwar Prasad* v. *State of Bihar* A.I.R. 1959 Pat. 187.
79. A.I.R. 1959 S.C. 395 (already cited in Vol. I of this Book).

that his right under Art. 19 (1) (a) was infringed. As we had referred already (*vide* Vol. I) to the substance of the arguments in the case, it is sufficient if we now focus attention only on some of the import features to be particularised further.

The finding of the majority judges was that the petitioner had no Fundamental right in respect of publishing the proceedings of the House for the simple reason that under Article 194 (3) the privileges of the House of Commons in England govern also the Indian Legislatures till an appropriate law is made in this regard in India. The House of Commons had exercised the fullest control and publication has to be only on permission. This was found necessary in England in the early days since the Crown and Parliament were at loggerhead, and Parliament had to be very careful to preserve its secrecy and so prohibited publication of news. But as the tension between the Crown and Parliament grew less and less and as a vigorous press also fought for its rights, slowly a convention grew up in England to permit true and accurate reporting. There was a press gallery in Parliament. But once the press published false or inaccurate report or proceedings of a secret session or published expunged portions, then notice to show cause for contempt of Parliament was generally issued and in that notice the entire publication (false and true portion) was treated as not having been officially permitted. As democratic days emerged more in evidence for nearly a century in England there was no such instance where the Commons hauled up any one for such a breach of privilege and so it is that Justice Subba Rao in his minority judgment pleaded for a harmonious construction of Art. 19 (1) (a) and Art. 194 (3) : As the latter clause invoked only the usage of the House of Commons as existing in 1950, the time when the Indian Constitution came into force, Justice Subba Rao stated that an usage that fell into disuse and was not in existence in 1950 should not be binding on the Indian Legislature or the Indian citizen. Art. 194 (b) has not words that exempted it from the operation of Art. 19 (1) (a). To state that Art. 19 (1) (a) is subordinate to Art. 194 will render freedom of speech and of the press inacuous. Both the freedoms could be protected. The privilege can be considered as a reasonable restriction under Art. 19 (2). In fact even the majority judgment in the instant case state that if a law is passed under Art. 194 detailing the privileges, it should be subject to Art. 19 (1) (a). A difficulty may arise since in Art. 19 (1) (a) the exceptions mentioned among others is 'contempt of court' and not 'contempt of Parliament'. Obviously, this was the reason why the majority had to treat Art. 194 as distinct from Art. 19 since otherwise it may be argument that as the clause in Art. 19 (1) (a) stands at present, freedom of speech cannot be curtailed in the interest of 'contempt of Parliament'. But this lacuna can be eradicated by an amendment of Art. 19 (1) (a). The majority view that the earlier case *Keshava Reddy* v. *Nafisul Hussain*[80] was a hasty concession to counsel appears interesting. In that case[80] on the warrant of the Speaker, the petitioner was arrested and kept in the custody of the House. Art. 22 enjoins that on arrest, the detenu should be produced before a magistrate within 24 hours on the principle that the arrested person should be appraised of the fact of his arrest and why he is arrested. The court in that case[80] held that the procedure was illegal and ordered release, thereby affirming that Art. 194 should be subject to procedural safeguards outlined in Art. 22. We submit that this is a sound view and in no way derogates from the high authority of the Speaker of a Legislature. It is necessary to emphasise that in the matter of interpretation of the Constitution, it must be assumed that the legislative, judicial and executive

80. A.I.R. 1954 S.C. 636.

power are subordinate to the Constitution. The Constitution is paramount in India just as the Parliament is supreme in England. So when a problem faces as to whether the legislature has superior rights *vis-a-vis* the rights guaranteed to the citizen, the rule of harmonious construction should aim at upholding the supremacy of the Constitution. In that view Part III cannot but co-exist with Art. 194 and Parliamentary privilege can be safeguarded by the rule of reasonable restrictions envisaged under Art. 19 (2). What is important in England as historical necessity need not be the law in India. Democracy thrives by discussion and healthy criticism. Press reporting is also part of freedom of speech. While there can be restrictions placed on the press in respect of secret session, expunged portions of speeches in Parliament, there can be no victimization for true and accurate reporting. The majority in the instant case had to deal on a broader basis, the expugned and the non-expunged portions of the speech both coming within its purview. The majority were, therefore, probably driven to the necessity of upholding Art. 194 as against Article 19 (1) (a) and (2) as it is today. A constitutional amendment of Art. 19 (2) to include 'contempt of Parliament' is called for. It is also high time that the Indian legislatures formulate their own code of privileges instead of seeking shelter in the labyrinth of House of Commons Privileges of England.

ARTICLE 19 (1) (d).

Permits, if unreasonable.

Section 3 of the Influx from Pakistan (Control) Act provides that if a person enters the country from Pakistan, he will have to be in possession of a permit. Is it an unreasonable restriction on the freedom of movement? A sovereign country should be entitled to restrict even its citizens from entering its country if they came from outside, the object being the safety of India which may get jeopardised by indiscriminate entry of undesirable persons. Further the Constitution only guarantees the right of movement inside the country. It does not guarantee movement outside the country. So an Indian who has gone out to Pakistan and seeks to re-enter India, cannot claim that his right to movement in India is jeopardised[81].

ARTICLE 19 (1) (f).

Reasonable Restrictions.

In *Mohammad Umar* v. *Amir Mohammad*[82] it was held that all customary law including the personal law is preserved by Art. 372. Art. 19 (1) (f) can therefore be no bar to the customary right of preemption exercisable under the Mohammadan Law. The Fundamental Rights guaranteed by Art. 19 (1) (f) are subject to reasonable restrictions and it is not an absolute right.

Any reasonable restriction upon the right to hold property which is in public interest would be valid. But there must be certain safeguards. Firstly, the person whose property is being taken away must have an opportunity of making representation. The person responsible for making the order must be a qualified person. He should not be a law unto himself and there should be an appeal. The power should not be naked and arbitrary[83]. In the instant case[83] arising under the W. B. Land (Requisition and Acquisition) Act II of 1948, no question of acquisition and compensation arose. The requisition being in public interest was held a reasonable restriction within the meaning of Art. 19 (1) (5).

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81. *Nazimuddin* v. *State* A.I.R. 1959 All. 19.
82. A.I.R. 1958, M.P. 428. Relies on A.I.R. 1954 S.C. 417 and observation of Patanjali Sastri C.J. in A.I.R. 1952 S.C. 235.
83. *Sri Laxmi Janardan Jew* v. *State of W. B.* 63 C.W.N. 101.

The provisions of Shri Jagannath Temple Act XI of 1954 were held *intra vires* of Art. 19 (1) (f)[84]. The powers conferred on the administrator of the Temple under Sec. 21 (2) (e) and (f) and 21 (4) are not arbitrary powers. So long as a judicial tribunal is given the ultimate power to decide whether any order of the executive authority which affects the right of property of an individual is justifiable or not, that statutory provision cannot be held to impose an unreasonable restriction on the right of the property[84].

In *M. C. V. S. Arunachala Nadar* v. *State of Madras*[85] the Supreme Court reaffirmed the standard tests of reasonableness. In order to be reasonable, a restriction must have a rational relation to the object which the Legislature seeks to achieve and must not go in excess of that object. The nature of the right, the underlying purpose, the extent or urgency of the evil sought to be remedied, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. No abstract standards or general pattern of reasonableness can be laid down for all cases.

The High Court of Tripura held[86] that the Government Premises (Eviction) Act, 1950 was *ultra vires* of Arts. 14 and 19 (1) (f) as it provided for the decision of the title of a person to property by a person who may not possess any qualification for the same and again, the decision had to be according to his subjective satisfaction. No provision for a hearing or for an appeal or for redress in a Civil Court was provided[86].

In *Kashi Prasad Sinha* v. *State of M.P.*[87] it was posited that printing and publishing of school text-books by Government cannot be construed to infringe the freedoms of profession [Art. 19 (1) (f)] and property [Art. 19 (1) (g)]. Simply because the Board of Secondary Education chooses not to prescribe the petitioner's books as text-books for the school classes and his books do not get a ready market for sale, he can make no grievance of right as affecting any fundamental right.

In *Ramchandra Deb* v. *The State of Orissa*[88] the test in deciding whether the hereditary right to a religious office in Temple is property or not, was stated to be whether the holder of the office has any personal interest of a beneficial character in the properties of the temple. If he has no such interest, it is not property at all[88].

The question of reasonableness is really one of balancing conflicting interests of reconciling individual right and social welfare in a particular case. In a Patna case[89], it was consequently held that the restrictions imposed by the Bihar Milled Rice Procurement (Levy) Order and Milled Rice (Bihar) Price Control are reasonable restrictions in the interests of the general public. The object of price fixation as mentioned in Sec. 3 (1) of the Essential Commodities Act is to maintain the supplies of essential commodities at a fair price to the general public. The fixation of one uniform controlled rate is inherent in the power to control the sale and distribution of an essential commodity and the mere fact that in consequence of such fixation of price some loss may fall upon an individual cannot lead to the implication that the provisions of the Central order are constitutionally invalid.

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84. *Gochhikar* v. *State of Orissa*, A.I.R. 1959 Orissa 17.
85. A.I.R. 1959 S.C. 300. Relies on A.I.R. 1950 S.C. 118 follows A.I.R. 1952 S.C. 196.
86. *Mahendralal Chakraborti* v. *Union Territory of Tripura* A.I.R. 1959. Tripura 21.
87. A.I.R. 1959 M.P. 183.
88. A.I.R. 1959 Or 5: I.L.R. (1958) Cut. 369.
89. *M/S N. R. Chiranjilal* v. *State of Bihar* A.I.R. 1959 Pat. 268.

ARTICLE 19 (1) (g).

Restrictions, when unreasonable.

The Municipal Board Lucknow purported in one case[90] to act under Sec. 298 (2) of the U. P. Municipal Act (1916) read with List I H (C) and (9) while making certain bye-laws 9, 12 and 15 which related respectively to the number of rickshaws to be licensed, detention of unlicensed rickshaws and to the fee chargeable for the period of detention. The court held that as the power for framing bye-laws 9 and 15 were not in Sch. I, they were illegal, and that Cl. (c) and (d) of List I. H. did not at all empower such an authority. Further the bye laws contained no rules or principles controlling the discretion of the Executive Officer of the Board, in the matter of granting or refusing licenses and as such offended Art. 19 (6)[90].

The Madras Commercial Crops Markets Act XX of 1933 was held *intra vires* by the Madras High Court as the statute in essence regulated the buying and selling of commercial crops by providing suitable and regulated market by eliminating middlemen and bringing face to face the producer and buyer. This was quite a reasonable restriction on the right to trade[91].

In *Nagpur K. K. Samaj* v. *Corporation of City of Nagpur*[92] the action of the corporation in prohibiting the sale of meat in weekly markets by its resolution was not authorised by law and offended the right of the sellers of meat. There can be no law fettering the right to trade unless it be in general public interest and the restrictions are reasonable[92].

In a matter like the distribution of cement and control of its price, the only way to control the distributors effectively is that licenses should be liable to be cancelled if the instructions to be given by the Government to them are disobeyed[93]. The High Court will not ordinarily interfere in the matter of cancellation of licence but when the conduct of the licensee is reprehensible, the court will uphold and order the cancellation of licence[93].

Art. 19 (1) (g) being applicable to citizens only a company incorporated in India and which is certainly not a citizen of India cannot challenge Sec. 52-A and S. 167 (12-A) Sea Customs Act on the ground that they infringe Art. 19 (1) (g)[94]. Discrimination can take place between equals and as between a citizen and a non-citizen. Further, there being widespread smuggling across the seas such provisions were salutary and reasonable[94].

The Madras High Court held in a case[95] that Sec. 178-A (1) of the Sea Customs Act (1878) was *ultra vires* of Art. 19 (1) (f) and (g) since it imposed on the persons from whom the gold was seized the burden of proving that the seized gold was not smuggled gold. The severity of the burden imposed by the legislature defeats the very purpose it had in view[95].

The Supreme Court upheld the rules regulating Coir Industry in *P. V. Siva Rajan* v. *Union of India*[96] as quite reasonable. It opined that granting permits or licence to export or import dealers on the basis of a quantitative test

90. *Municipal Board Lucknow* v. *Sardar Iqbal Singh* A.I.R. 1958 All. 853.
91. *M.C.V.S. Arunachola Nadar* v. *State of Madras* A.I.R. 1959 S.C. 300.
92. A.I.R. 1959 Bom. 112.
93. *M/S Mokandlal Mandanlal* v. *Director of Industries Pepsu Govt.* I.L.R. (1958) Punj. 36.
94. *Everett Orient Line Incorporated* v. *Jasjitt Singh* A.I.R. 1959 Cal. 237.
95. *Nathela Sampathu Chetty* v. *Collector of Customs* A.I.R. 1959 Mad. 142.
96. A.I.R. 1959 S.C. 556.

is not unknown in regard to export and import of essential commodities. It would be obviously for the rule-making authority to decide which test would meet the requirements of public interest and what method would be most expedient in controlling the industry for the national good. Even the adoption of a qualitative test may tend to extinguish the trade of those who do not satisfy the said test ; but such a result cannot be treated as contravening Art. 19 cl. (6) though it may cause hardship in certain cases.

When the prices of iron and steel goods fixed by the Iron and Steel Controller of India under Cl. 11 B of the Iron and Steel Control Order of 1941 are fixed by an authority mentioned in Sec. 4 of the Essential Supplies (T. P.) Act (1946), unless the prices are unreasonable, the notification cannot be struck down as offending Art. 14[97]. The presumption is in favour of the fairness of price when it is fixed by an authority under valid statutory powers[97].

The phrase 'reasonable restriction' in Art. 19 (6) connotes that the limitation imposed on person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public[98]. A naked or arbitrary power granted to executive authority, without limit, is not a reasonable restriction and will be struck down. An arbitrary exercise of power will also be declared void.

In *Sardar Iqabal Singh* v. *Municipal Board*[99] it was held in the matter of limiting the number of Rickshaws plying in an area, public interest was served as it tended to the gradual elimination of the use of human labour and the avoidance of congestion on the road. It is left to the Board to fix the proper number and this cannot be interfered with unless it is made clear that the Board had taken into account matters with which it has no connection or has acted in bad faith.

In *Messrs. D. S. & G. Mills* v. *The Union of India*[1] the Supreme Court upheld the Central Government Notification under the Essential Commodities Act read with Sugar (Control) Order, as reasonable inasmuch as it compelled factories to sell sugar at a fixed price. The safeguards mentioned in Clause (5) of the Sugar Control Order were held sufficient to prevent abuse of power by the Central Government. The price fixed was not arbitrary nor below cost of production.

In *Raman and Raman Ltd.* v. *State of Madras*[2] it was held that the appellant had a fundamental right to ply motor vehicles on a public pathway subject to reasonable restrictions. Imam and Subba Rao, J.J., held in the instant case that orders made and directions issued under Sec. 43-A could cover only the administrative field of the officers concerned and therefore any direction issued thereunder was not law regulating rights of the parties. The appellant could not question the validity of the order on the ground that the Board decided the appeal on a law that was made subsequent to the issue of the permit to him. Proceedings before tribunals issuing permits are of quasi-judicial in character.

Taxation Law (Art. 265) if subject to Art. 19 (1) (g).

A tax may be such that it seriously hinders the carrying on of business. While the courts could not interfere simply on the grounds of hardship, in the case of an unconscionable tax, it could interfere if the quantum of taxation was such as to make the carrying on of trade or business wholly impossible[3].

97. *Bhagwati Saran* v. *State of U.P.* A.I.R. 1959 All. 332.
98. *Kishanchand Arora* v. *The Commissioner of Police* A.I.R. 1959 Cal. 123: 62 C.W.N. 799.
99. A.I.R. 1959 All. 186.

1. A.I.R. 1959 S.C. 626.
2. A.I.R. 1959 S.C. 694.
3. *Liberty Cinema* v. *The Commissioner, Corporation of Calcutta and another* A.I.R. 1959 Cal. 45.

in the instant Calcutta case[3] it was pointed out that it is now firmly established that an uncontrolled and arbitrary power without any restrictions whatsoever cannot be granted to the executive or a non-legislative body, if it is possible by the exercise of such power to affect the rights guaranteed to a citizen to carry on trade or business. Since even the levy of a tax can be made the subject-matter of violation of fundamental rights under Art. 19, there is no reason why an unrestricted or arbitrary power which is so wide in terms as to make it possible for the executive or a non-legislative body to impose such a tax as would make it impossible or onerous for a citizen to carry on his trade or business, should not be struck down. It is no answer to say that the Government or the corporation were not likely to act arbitrarily. The test of constitutionality is not whether a matter is capable of being acted upon within such limits. It would be bad so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out.

Is Corporation a citizen?

In Article 19 the word 'citizen' is used. Does the protection extend to corporations and companies? Under Articles 5, 6 and 8 it has been construed that only natural persons can be citizens[4]. Corporations are artificial entitles. However, in State of Bombay v. Chamarbaugalia[5] the Bombay High Court has construed that a corporation whose shareholders are citizens and which has domicile in this country can exercise fundamental rights except those rights which are inherently of such a nature that an artificial body as a corporation or a company cannot exercise[6]. It can be construed therefore that a corporation whose members are citizens can claim rights of association[7]. It can claim right to property[5]. It can exercise right of doing a business[5]. In the Punjab case[4] however the company against whom notice under Sec. 52-A of the Insurance Act has been served could not claim the right under Art. 19 (1) (f) and (g). But the question appears not to have been finally settled. There is no clear and direct pronouncement on the subject by the Supreme Court though there are decisions affecting limited companies[8]. In the latter case the subject was neither specifically raised or discussed. Under the Indian Citizenship Act, LVII of 1955, corporations cannot claim to be citizens vide Ss. 2 to 7 of the Act. Citizenship by birth, decent, registration, naturalisation and by incorporation of territory are alone provided for. The American opinion appears to be that corporations are not citizens, as they are creations of local law and they could claim no legal existence or right to do business beyond the limits of the grants that created it[9]. The State may discriminate as between corporations and exclude foreign corporations or restrict their activities. In America, the above rule is observed, but once the foreign corporation is admitted to do business in a state, it is entitled to equal protection with State's domestic corporation[10]. The word used in Art. 14 is 'person'. In America 'corporations' were construed to be persons within the meaning of the due process clause of the fourteenth Amendment[11].

Nationalisation of Motor Transport.

In G. Nageswara Rao's case[12] the Supreme Court examined the constitutional

4. *Jupiter Ins. Co.* v. *Rajagopalan* A.I.R. 1952 Punjab 9.
5. A.I.R. 1956 Bom. 1.
6. *Chiranjit Lal* v. *Union of India* 1950 S.C.R. 869 (at 898).
7. *Narayan Prasad* v. *Indian Iron Co.* A.I.R. 1953 Cal. 696.
8. *Express Newspapers Ltd.* v. *Union of India* A.I.R. 1958 S.C. 578.
9. *Paul v. Virginia* (1888) 8 *Wall* 168.
10. *Hanover Ins. Co.* v. *Hardinge* 272 U.S. 494.
11. *Minneapolis & Co.* v. *Beckurth* 129 U.S. 26 (28).
12. *G. Nageswara Rao* v. *A.P.S.R.T. Corporation* A.I.R. 1959 S.C. 308.

validity of Chapter IV A of the Motor Vehicles Act (1939 as amended by Act 100 of 1956) *vis-a-vis* Art. 19 (1) (g) and Art. 31 (2). The said Chapter under which the transport authority is empowered to cancel the existing permit and issue a permit to the State Transport undertaking, if a Scheme is promulgated empowering the State Transport undertaking to take in hand the transport service in relation to any area, route, portion thereof to the excusion of any person, who has been carrying on the business in that route, does not provide for the transfer of ownership or the right to possession of any property to the State, or to a corporation owned or controlled by the State. Under Article 31 unless there is such a transfer, the law shall be deemed not to provide for compulsory acquisition or requisition of property, and therefore in such a case, no compensation need be provided for under Art. 31 (2). It was held that Chapter IV-A does not infringe the Fundamental Right of existing permit-holders, who have been carrying on the business in those routes under Art. 31. It cannot be said that if the transport authority is empowered to cancel the permit of a person carrying on his transport business in a route and gives it to another, the process involves a transfer of business of undertaking of the *quondam* permit-holder to the new entrant. From the fact that Sec. 68 G. provides for payment of compensation to the holder of the permit cannot be inferred that the legislature assumed that the cancellation of a permit involved a transfer of property from the previous permit-holder to the State. The Road Transport Department of the Andhra Pradesh Government is a State Transport undertaking under the Central Act and therefore it was within its competence to initiate a scheme under Sec. 68-C. The State Transport Authority can frame a scheme only if it is of opinion that it is necessary in public interest that the road transport service should be run or operated by the Road Transport undertaking.

As to whether the scheme can be questioned under Art. 32 by a writ of *certiorari*, is discussed under Article 32.

ARTICLE 20.

English Precedents.

Both the Fifth Amendment (to the American Constitution) and the principles embodied in Article 20 of the Indian Constitution have their source in the Common Law of England. Therefore, the interpretation as given to this rule in English courts has also a great bearing on the interpretation of Article 20[13].

ARTICLE 20 (2).

Proceedings under Sea Customs Act.

The Supreme Court by a majority held[14] that proceedings under Sec. 167 (8) of the Sea Customs Act are not 'prosecution' within the meaning of Art. 20 (2). Therefore confiscation of goods as well as levy of penalty on the person by customs authorities do not attract Art. 20 (2) so as to prevent prosecution and imprisonment under Sec. 167 (81) of the Act read with Sec. 23 and Sec. 23 B, Foreign Exchange Regulation Act and under Sec. 120-B, Penal Code. 'Prosecution' means a proceeding either by way of indictment or information in the criminal courts in order to put an offender upon his trial. The Chief Customs Officer or any other officer lower in rank than him in customs department is not a court and this is made clear by Sec. 187-A of the Sea Customs Act.

13. *Mallela Suryanarayana and others* v. *Vijay Commercial Bank Ltd.* A.I.R. 1958 Andh. Pra. 756: (1958) 2. An. W. R. 231

14. *Hsomas Dana* v. *State of Punjab* A.I.R. 1959 S.C. 375.

But Subba Rao, J. in his dissenting judgment in the said case[14] opined that the word 'prosecuted' is comprehensive enough to take in a prosecution before an authority other than a magisterial or a criminal court. The entire scheme of the Act leaves no doubt that the customs authority function under Sec. 167 of the Act as a judicial tribunal. When the record discloses that the accused was prosecuted and punished on the same facts, it cannot be held that the offence for which he was prosecuted by the Magistrate was different from the one for which he had already been prosecuted and punished by the customs authority. In that view Subba Rao, J. held that the prosecution and punishment by the Magistrate directly infringes the fundamental rights under Art. 20 (2). It is submitted that the dissenting judgment appears worthy of further consideration.

ARTICLE 20 (3).

Civil Proceedings.

The immunity contemplated by Article 20 (3) does not extend to civil proceedings. The fact that the answers given by a person might tend to subject him to a criminal prosecution at a future date will not attract the protection envisaged by Article 20 (3)[15]. The intendment of this Article was to afford some protection to a person involved in a crime, having regard to the predicament in which he would be placed and that is revealed by the juxtaposition of that clause. To interpret it as applying to all proceedings, civil or criminal, which might at a subsequent period expose the person concerned to a prosecution on the basis of answers given by him, is to enlarge the scope of this Article and to defeat justice. To stretch this prohibition to civil cases would be to put a premium on dishonesty. This is not the purpose underlying the Article[15].

The protection afforded by Article 20 (3) is available to a person accused of an offence not merely with respect to the evidence to be given in the court room in the course of a trial but it is also available to him at previous stages, if a formal accusation had been made of the commission of an offence which might in the normal course result in prosecution. The language of Article 20 (3) is to 'witnesses' and not to 'appear as witnesses' and therefore the extortion of any evidentiary material even at the stage of investigation which may aid the building up of a case against the respondents in the instant case[15] was held to be within the condemnation of the Article. This meaning of the constitutional guarantee against self-incrimination appears to be self-evident because if officers, competent to prosecute a man, can after telling him that according to their information he has committed an offence, extort oral or documentary testimony from him which may be used directly or indirectly to bring the charge home to him, the guarantee must be a very hollow guarantee indeed[15].

ARTICLE 21.

Is contempt law bad for want of 'Procedure established by law'.

In State of Bombay v. 'M. P.'[16] the respondent had to answer a charge of contempt for publishing an objectionable cyclostyled document and circulating it among members of the Bar and the public during a session of the Mundhra Enquiry held by the Chief Justice of the Bombay High Court. The document was couched in deliberately insulting language with calculated malice against Chief Justice Mr. Chagla and Mr. Justice S. T. Desai. In

15. *Mullela Suryanarayana and others* v. *Vijay Commercial Bank Ltd.* A.I.R. Andh. Pradesh 756.
16. A.I.R. 1959 Bom. 182.

answer to the rule of contempt the contemnor respondent (a Barrister) took the plea that the proceedings initiated by the High Court offended Art. 21 for want of a clear procedure established by law so far as the inherent jurisdiction of the High Court in contempt is concerned and that therefore it was not competent for the High Court to inflict punishment by way of imprisonment so as to deprive the contemnor of his personal liberty. This contention was negatived on the following grounds. So far as contempt of court is concerned statutory recognition is given by the Contempt of Court's Act of 1952 to the practice and procedure followed by the High Court prior to the coming into force of the Act. In view of the fact that by Sec. 3 it is provided that every High Court shall have and exercise the same jurisdiction, powers and authority in accordance with the same practice and procedure in respect of contempt of courts subordinate to it as it has and exercises in respect of contempt of itself the procedure the High Court followed in dealing with the contempt of itself is a procedure established by law within the meaning of Art. 21. Besides, there are also the provisions contained in Clause 38 of the Letters Patent. The High Court has jurisdiction within the meaning of that clause when the proceedings by way of contempt are criminal in nature and the case connected therewith is a criminal case. Letters Patent constitute Law. The procedure and practice which was in use prior to the publication of the Letters Patent were required to be followed by that clause in such a case and hence such practice and procedure must be held to have been enacted by law. In view of these provisions the procedure which is being followed by the High Court since prior to coming into force of the Letters Patent in dealing with matters of criminal contempt in the exercise of its inherent power as a Court of Record is a procedure enacted by law and the High Court is therefore entitled to deprive a person of his liberty in matters relating to contempt when that procedure has been followed, even if the expression 'procedure established by law' in Art. 21 meant procedure enacted by law.

ARTICLE 21.

Legislative Procedure and Article 21.

In *M. S. M. Sharma* v. *Shri Krishna Sinha*[17] the Supreme Court of India made an important pronouncement to that Art. 19 (1) (a) was in effect subordinated to the privileges of Parliament under Art. 194. Of the soundness of this proposition we had discussed already under our comments on Art. 19 (1) (a). Art. 19 (1) (a) cannot be ignored even when Art. 194 is applied. If the rule of harmonious construction were applied we could as well state that the Rules of the House of Commons applicable to the Lok Sabha in India should be only those rules that were in active vogue in England. Complete power to prohibit all reporting in the press of the proceedings of Parliament was not in actual uses in 1950 in England. The Constitution of India which came into effect in 1950 cannot therefore ignore the need for observing the rule of reasonable restriction which alone was the yardstick for restricting freedom of the press under Art. 19 (1) (a). Art. 194 (3) further enjoins Parliament to frame its own rules of privilege after which event the usage of the House of Commons will cease in application to India. It is a pity that from 1950 to 1959 as yet the Parliament of India has not framed such rules. If it does frame such rules it will certainly take into consideration the constitutional guarantee offered in Art. 19 (1) (a) and the situation brought about in M. S. M. Sharma's case[17] could be avoided. In the latter case the Bihar Legislative Assembly had framed

17. A.I.R. 1959 S.C. 395.

rules in exercise of its powers under Art. 208. Art 194 (3) read with the rules so framed was held to lay down the procedure for enforcing its powers, privileges and immunities. The Supreme Court was of the opinion that Art. 21 was satisfied since the Legislature had the powers, privileges and immunities of the House of Commons and so if the petitioner is eventually deprived of his personal liberty, as a result of the proceedings before the Committee of Privileges, such deprivation will be in accordance with procedure established by law. We may state that the procedure established should not offend Art. 19 (1) (a) and deprive the petitioner of his right of speech. Reporting in the press should necessarily be regulated in the interest of security of State, public order, incitement to an offence, defamation, contempt of court, decency etc. If the press report is false, malicious and offends Parliament's dignity, certainly Parliament may exercise its jurisdiction as against the contemnor. But to yield power to Parliament so as to ban all reporting is to destroy free speech. If it is a secret session or a war emergency then control is called for. But should even the day to day session suffer 'iron curtaining'. The essence of democracy lies in free discussion. Discussion in Parliament should be publicised to help the public to weigh the pros and cons of the matter in issue. The voter is entitled to know what is happening in Parliament and if his member voices the opinion of his constituency. To leave to the tender mercy of parliamentary discretion the bona fide publication of parliamentary speeches defeats the purpose of democracy. Parliament is there to protect, nourish and foster democracy and not to 'iron curtain' it!

ARTICLE 22.

Past conduct.

As a rule, the antecedants, conduct and past activities of a person or a body of persons or an organisation help to find out the present attitude of that person or the body of person or organisation for coming to the conclusion whether he, or the organisation is acting or likely to act in a manner prejudicial to the security of the State and the maintenance of public order[18]. If the present conduct reveals that it is rooted in objectionable acts and activities of the past there is no reason why those past activities should not be considered at all. The object of preventive detention, is to prevent likely prejudicial activity in the immediate future on the part of the detenu and reasonable apprehension as to it may be based on his past conduct. It is not punitive detention which comes after the illegal act which has actually been committed. It is in fact the reasonable and probable apprehension of something that may be done in future which is prejudicial to the security of the State etc., that is sought to be prevented by means of preventive detention[18].

But preventive detention Act is not meant for the purpose of detaining habitual criminals, as in that case it would really take the place of the Criminal Procedure Code[19].

ARTICLE 22 (2).

Production of arrested persons before Magistrate.

The provisions of Art. 22 (2) and Sections 61 and 167, Cr. P. C. clearly indicate that the purpose of producing an accused before a magistrate is to ensure that the arrest and the detention of the accused person is, at any rate,

18. *Sultan Salehuddin* v. *The State of Andhra Pradesh etc.* A.I.R. 1959 An. Pr. 73. relies on A.I.R. 1951 S.C. 481, A.I.R. 1957 S.C. 28: A.I.R. 1952 Hyd. 112: A.I.R. 1950 All. 709.

19. *Sangappa Mallappa Mudaliar* v. *State of Mysore* A.I.R. 1959 Mys. 7. (Per Das Gupta C.J.).—

prima facie justified. The law apparently did not rely on the judgment of the police for purpose of accepting that the charge that was being levelled against a person was, even prima facie sustainable. It is for the magistrate to decide, though prima facie, on certain material placed before him, namely, the material contained in the diary relating to the case, whether or not the detention in prison of an accused is necessary. In coming to his conclusion the magistrate has to exercise his judicial mind. That alone will render the order valid[20]. The guarantee contained in Art. 22 (2) was intended to offer protection to the subject against the act of the executive or other non-judicial authorities. The protection would become meaningless if one, who is supposed to be the protector of the subject is merely to act mechanically without applying a judicial mind to see whether the arrest of the person produced before him is legal and further regular and in accordance with law.

ARTICLE 22 (5).

What is contemplated by Art. 22 (5) is the communication of the grounds which should still be sufficient to enable the detenue to make his representation against the order at the earliest opportunity[21]. The grounds are conclusions of facts and not recitals of facts. If the grounds furnished are definite, clear and precise and are expressed in an understandable manner sufficient to serve the purpose for which they are communicated, the detenue cannot complain of anything further[21]. Where the State takes recourse under Clause (6) of Art. 22, it must prove that the authority concerned was satisfied that it was not in public interest to disclose facts upon which the grounds for detention were based[22].

ARTICLE 25 (1).

Cow slaughter is not religious belief.

In *M. H. Quareshi* v. *State of Bihar*[23] it was pointed out that subject to the restriction which Article 25 imposes, every person has a fundamental right not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morale of people. It was held in the instant case[23] that the sacrifice of a cow on Bakrid day was not obligatory overt act for a Mussalman to exhibit his religious belief and idea and consequently, there was no violation of the fundamental rights of Mussalmans under Art. 25 (1).

In a Manipur case[24] it was held that the Hindu Marriage Act which imposes monogamy on the Hindu, is not *ultra vires* of Article 14, 15 or 25 of the

20. *Bir Bhadra Pratap Singh* v. *D. M. Azamgarh* A.I.R. 1959 All. 384, relies on A.I.R. 1953 S.C. 10 and A.I.R. 1954 All. 601.
21. *S. Salehuddin* v. *State of Andhra Pra.* A.I.R. 1959 Andh. Pr. 73 relies on A.I.R. 1951 S.C. 270.
22. *Sangappa Mallappa Mudaliar* v. *State of Mysore* A.I.R. 1959 Mys. 7.
23. A.I.R. 1958 S.C. 781.
24. *H. B. Singh* v. *T. N. H. Ongbi Bhani Devi* A.I.R. 1959 Manipur 20, refers to A.I.R. 1952 Mad. 183 A.I.R. 1952 Mad. 638 and A.I.R. 1957 All. 411.

Constitution. If the Legislature as the law-making authority regards a particular measure as a measure of social reform, the court should respect the same. "The fact that according to Hindu Sashtras marriage is a sacrament and is regulated by the Sashtras and the essential principle underlying a Hindu marriage is perpetuation of family by birth of sons, yet, nonetheless marriage is a social institution and it may be for the welfare of the State to control such an institution and to bring about measures of reforms which the legislature's wisdom thinks proper to do in the interests of the State[25].

ARTICLE 26.

In *Jagannath Ramanuja* v. *B. K. Patra, Commissioner of H. R. E. Board,* the Orissa H. R. E. Act 2 of 1952 was examined and the principles to which a scheme framed under Sec. 42 were laid down and where it offended Art. 26, directions were given to the Commissioner to modify the scheme according to law. Clause (3) of the scheme which does not expressly say that the four other trustees should also be of the same persuasion to which the Math belonged (Sri Vaishnava of the Ramanuja School) offended Art. 26.

ARTICLE 31 (2).

Compensation.

The Supreme Court upheld the constitutionaiity of the U. P. Consolidation of Holdings Act 5 of 1954 in Attar Singh v. State of U.P.[26]. The court held that taking into account the peculiar conditions in cases of consolidation and that remembering that the land taken from each individual tenure-holder may be small bit and it is then consolidated into a large area by adding some other lands taken from other tenure-holders and the whole is then used for the advantage of the whole body of tenure-holders, it cannot be said that the said compensation, added to the advantages which the tenure-holders get in the large area of land thus constituted and on account of getting a compact block for themselves, is inadequate. Even assuming that Art. 31 (2) applied as it was before the Fourth Amendment, it cannot be said that the compensation which the tenure-holders will get under Sec. 29-B was inadequate under the circumstances.

In *Deepchand* v. *State of U.P.*,[27] the Supreme Court sustained the U.P. Transport Service (Development) Act of 1955 which prohibited the stage carriage operators from doing their motor transport business thus depriving them of their property or interest in a commercial undertaking within the meaning of Art. 31 (2). As the Act was prior to the Constitution Fourth Amendment and since there was provision for compensation made, the impugned Sections 5 and 11 were held valid.

In an Assam case[28] the Assam Fixation of Ceilings on Land Holdings Act 1 of 1957 was held *intra vires* of Art. 31. The Act laid down the principles of compensation though it is not justiciable as stipulated in the amended Art. 31 (2). A legislation which aims at agrarian reforms by nationalising the means of production or eliminating concentration of lands in the hands of a few individuals or even at removing intermediaries between the Government and tillers of the soil so as to increase wealth and production is a legislation for a public purpose. The general interest of the community as opposed to the particular interest of individuals is of paramount importance. It is not so much the use of the property by the public which matters as the acquisition being useful to the pub-

25. *Ram Prasad Seth* v. *State of U. P.* A.I.R. 1957 All. 411.
26. A.I.R. 1959 S.C. 564.
27. A.I.R. 1959 S.C. 648.
28. *Anil Kumar* v. *Dy. Commr. & Collector* A.I.R. 1959 Ass. 147.

lic. If the purpose for which the acquisition is made results in benefit or advantage to the public, it is a public purpose though the acquisition may be in favour of a private corporation or of individuals. It is not of the essence of the public purpose that the entire community or even a considerable portion thereof should directly enjoy or participate in the acquisition[28].

In an Andhra Pradesh case[29] it was explained that the effect of a reading of Article 31 (2) or 31 (5) is that the rights guaranteed to a citizen under Art. 31 (2) are subject to the provisions of any 'existing law' governing the acquisition and payment of compensation therefor. It is difficult to read Art. 31 (2) as vesting legislative authority in the State Legislature and Art. 31 (5) as curtailing those powers. There is no scope for putting the interpretation that Art. 31 (5) disables the State Legislature to enact laws inconsistent with the existing law as defined in Art. 366 (10). The State Legislature can make its own laws providing for payment of compensation. All that Art. 31 contemplates is that there should be no compulsory acquisition unless it be for a public purpose[29].

ARTICLE 31-A.

In a Calcutta case[30] it was pointed out that where a person is granted a right to enter a forest and to cut trees in future, it is a licence coupled with a grant. It is not a mere sale of trees but a sale of interest in an immovable property or arising therefrom within the provisions of Sec. 6 (4) of the W. B. Estates Acquisition Act, 1953. Such a person is an intermediary and the interest gets vested in Government under Sec. 5 (aa) of the W. B. Act 25 of 1957. As the right relates to immovable property Art. 31-A gets attracted and hence even if no compensation was provided the High Court would be powerless to intervene. The first Amendment of the Constitution is in effect much more drastic than the fourth Amendment which extends only to Arts. 14, 19 and 31.

The provisions of Art. 31-A cannot be taken to be restricted to anything contained in Article 31-B nor can the mere fact that because the 9th Schedule included certain Acts which were validated would show that the Constituent Assembly intended to deal with parts of estates also. As a matter of fact Article 31-B provides clearly that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void but that was without prejudice to the generality of the provisions contained in Article 31-A. Article 31-B was introduced only because Article 31-A was not considered sufficient to cover the enactments violated by Article 31-B.

ARTICLE 32.

Constitutionality of scheme framed under Sec. 68-C, Motor Vehicles Act.

The question as to whether the scheme can be questioned in a writ of *certiorari* was considered in G. Nageswara Rao v. Andhra Pradesh Road Transport Corporation[31]. *Certiorari* can get attracted only if the administrative tribunal has a duty to act judicially. Such a duty can only be gathered from the provisions of the statute and rules made thereunder. If an authority is called upon to decide respective rights of contesting parties, or to put it in other words there is a *lis*, ordinarily there will be a duty on the part of the said authority

29. *Narasamopet Electric Corporation* v. *State of Andhra* A.I.R. 1959 And. Pra. 328.
30. *Sakti Pada Roy* v. *State of W.B.* A.R. 1959 Cal. 316 Relies on A.I.R. 1958 S.C. 532. Distinguishes A.I.R. 1957 Cal. 350 and A.I.R. 1958 S.C. 328.
31. A.I.R. 1959 S.C. 308 relies on A.I.R. 1950 S.C. 222; A.I.R. 1958 S.C. 398; A.I.R. 1958 S.C. 578.

to act judicially. Applying the aforesaid tests the majority opinion in the said case, (Per S. R. Das, C.J., N. H. Baghavati and Subba Rao J.J.) stated on a scrutiny of Ss. 68-C and 68-D of the Motor Vehicles Act and Rr. 8, 9 and 10 that it was obvious that the Act imposes a duty on the State Government to decide the Act judicially in approving or modifying the scheme proposed by the Transport Undertaking. The scheme propounded may exclude persons from a route or routes and affected party is given a remedy to apply to the Government and the Government is enjoined to decide the dispute between the contesting parties. The Statute already clearly therefore imposes a duty upon the Government to act judicially. So where pursuant to the rules the Minister who was in charge of Transport had made an order directing the Secretary to Government, to hear objection filed under Sec. 68-D against the scheme proposed by the State Transport Department and the Secretary to the Government Transport Department gave a personal hearing to the parties who had filed objections, and the entire material recorded by him was placed before the Minister in charge of Transport Department who made his order approving the scheme, and the order was issued in the name of the Governor, authenticated by the Secretary in charge of Transport Department, it must be said that the State Government gave hearing to the parties filing objections in the manner prescribed by the Rules made by the Government. But in the instant case[31] such a hearing when given by the Secretary, Transport Department, was held to offend the principle of natural justice that the authority empowered to decide the dispute between the opposing parties must be one without bias (the Secretary being interested in State Transport) and the proceedings and hearing given in violation of that principle are bad. Further, if one person (Secretary) hears and another (Minister) decides, then personal hearing becomes an empty formality. But Wanchoo and Sinha J.J. dissented from this view and held that the hearing under Sec. 68-D (2) was not before a quasi-judicial tribunal and that the State Government was acting purely administratively[32]. For there was no *lis* even though there may be two parties before the State Government at the hearing, there is no determination of the right of the parties before it. The determination is only of the efficiency etc. of the scheme proposed and whether it is in public interest. Where the hearing is administrative, it is not essential that the Minister must hear, so long as a hearing is given by an officer of the Government. This being an administrative hearing comes within the executive power of the State and there would be no infirmity if the Governor who, in view of the provisions of the General Clauses Act, is the State Government, authorised through the Minister a subordinate officer to give the hearing. Sinha, J., added that there is no *lis* between rival claims, no determinate tribunal to determine any *lis* and no procedure prescribed in Chapter IV A approximating or even stimulating judicial procedure. That being so, there is no question of any bias, because there can be none in a determination which is come to by officers of the Government in the discharge of their administrative duties.

The Kavalappara case—Disputed questions of fact if, can be gone into in writ proceedings.

The Supreme Court made a very important recent pronouncement in Kavalappara Kottarathil Kochunni alias Moopil Nair v. The State of Madras.[33] wherein the scope of Art. 32 has been explained in more detail than it had been hitherto done. The petitioner prayed for a writ of *mandamus* directing the respondent, the State of Madras and some of his kinfolk not to enforce the

32. Relying on 1948 A.C. 87; A.I.R. 1950 S.C. 222 and A.I.R. 1958 S.C. 578.
33. A.I.R. 1959 S.C. 725.

provisions of the Marumakkathayam (Removal of Doubts) Act 32 of 1955 passed by the Madras State Legislature. The petitioner had been claiming the Kavalappara *Sthanam* properties as his and this claim appears to have been upheld by the Privy Council in prior litigations. But as a result of the impugned Act he stated that he was discriminated against and that his right to property under Art. 19 (1) (f) and Art. 31 was affected. Two suits had been filed by respondents to enforce their rights in the suit properties which they asserted was family property. During the pendency of the first suit the *Sthanee* petitioner had executed two deeds of gift and sometime thereafter the above legislation was passed. Immediately the respondent members of the family published a notification in the local newspapers to hear the petitioners only as the *Karnavan* of the family property. The petitioner preferred the instant petition under Art. 32. Several objections were raised.

On the question whether alternative remedy was a bar to availability of Article 32, the Supreme Court after referring to the prior decisions[34] observed that even if the existence of other adequate legal remedy might be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226—as to which they expressly reserved their opinion—the Supreme Court could not on a similar ground decline to entertain a petition under Art. 32 because the right to move the court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution was itself a guaranteed right.

The decisions referred to in the instant case[33] may be grouped in two. One group to which the Kavalappara case belongs has cases like Romesh Thappar v. State of Madras[35] and Chiranjit Lal Choudhri v. Union of India[36] wherefor the alleged violation of a fundamental right the petitioner came directly before the Supreme Court. It is now a well-established position as stated in Romesh Thapper's case that the Supreme Court has a responsibility, not alone jurisdiction to entertain such petitions.

In the second group of cases, of which *Ashwini Kumar Ghose* v. *Aravinda* Bose[37]; M. K. Gopalan v. State of M. P.[38], and Purushottam v. B. M. Desai[39] are to be noted, the petitioner whose fundamental rights have been allegedly violated, initially elects to approach the High Court under Art. 226 and then when the High Court decides against him, instead of proceeding further in appeal to the Supreme Court abandons the adverse High Court decision on the wayside and files an original petition under Art. 32 before the Supreme Court. In such cases the Supreme Court has till now abstained from expressing a view whether it will generally encourage such a procedure. In Ashwini Kumar's case the proceeding was also on an alternative basis, namely as an appeal under Art. 136 and the relief, reversing the High Court's decision, was given in that case under Art. 136. In M. K. Gopalan's case and Purushottam's case, the petitioners were ultimately dismissed on merits. In the first, the court held that their decision on the merits should not be considered as an encouragement of such practice 'except for good reasons'. In Purushottam's case, after

34. *Rashid Ahmed* v. *Municipal Board Kairna* 1950 S.C.R. 366; *Romesh Thappar* v. *The State of Madras* 1950 S.C.R. 594.
35. *See* Journal of The Indian Law Institute Vol. 1. No. 3. pp. 421-425 cases and comments by the Author. The following are restated from editor's comments. Romesh Thappar's case (1950) S.C.R. 594.
36. 1950 S.C.R. 869.
37. 1953 S.C.R. 115.
38. 1955 1. S.C.R. 168, 174.
39. 1955 2. S.C.R. 887, 892.

admitting the petition, subject to its maintainability, it was dismissed on the merits without giving a decision on the maintainability. The chances therefore appear to be that in all genuine cases of violation of fundamental rights, the procedural elegance of taking recourse to appeals from the decisions of High Court under Art. 226 may not be insisted upon. However, the Kavalappara case does not belong to this second group and, therefore, quite adversely the court did not refer[40].

In respect of the second objection in Kavalappara case, that Supreme Court held that the gravamen of the complaint of the *Sthanee* petitioner was directly against the impugned Act passed by the Madras Legislature which was within the expression 'State' as defined in Art. 12. In respect of the third objection, the Supreme Court pointed out that though, in enactments like the abolition of estates, issuance of a notification by the State might be a condition precedent to the vesting of the property in the State, in the case of the impugned enactment the infringement of the fundamental right was complete *co-instanto* the passing of the enactment. It was also pointed out that in this case there had already been an assertion of rights by the respondents who were members of the family, in respect of the properties by suits and notice. In respect of the fourth objection that a proceeding under Art. 32 cannot be converted into or equated with a declaratory suit under Sec. 42 of the Specific Relief Act, the Supreme Court stated that the powers given to the court under Art. 32 were wide enough and was not confined to the issuing of prerogative writs only and citing an earlier precedent[41] and the breadth of the wording of Art. 32 concluded this was an eminently suitable case for giving the petitioner relief in the form of a declaration.

It will be noted that in the above four points the Supreme Court only restated the established law. But in meeting the last objection the court covered new ground. On the question as to whether disputed questions of fact can be gone into the proceedings under Art. 32 the court stated :

"Clause (2) of Art. 32 confers powers on this court to issue directions or orders or writs of various kinds referred to therein. This court may say that any particular writ asked for is, or is not appropriate or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition on merits. But we do not countenance the proposition that on an application under Art. 32, this court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or any other ground. If we were to accede to the aforesaid content of learned counsel, we would be failing in our duty as the custodian and protector of fundamental rights . . . . . We are not unmindful of the fact that the view that this court is bound to entertain a petition under Art. 32 and to decide the same as merits may encourage litigants to file many petitions under Art. 32, instead of a proceeding by way of suit. But that consideration cannot by itself be a cogent reason for denying the fundamental right of a person to approach this court for the enforcement of his fundamental rights which may *prima facie* appear to have been infringed".

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40. *See* Footnote 35.
See infra under title "If a petition under Art. 226 is dismissed and no appeal is filed can a writ lie under Art. 32?

41. *Abrahim Waxir* v. *The State of Bombay*, 1954 S.C.R. 933 (on appeal from an order under Art. 226).

About the manner of enquiry into disputed questions of fact the court mentioned that it could be done either by affidavits or where the affidavits filed were not satisfactory by giving another opportunity to file further affidavits or by issuing a commission, or even by setting the application down for trial on evidence or by adopting some other appropriate proceedings. The court expressly left open the application of these principles to proceedings under Art. 226.

We may add such principles should also be applicable to Art. 226 and it is to be noted that some of the High Courts have formulated rules somewhat in these directions. Settling the application for trial on evidence, has been often resorted to on the original sides of the Bombay and Calcutta High Courts[42].

The *Kavalappara case* has thus struck new ground, making available to the citizen better facilities to agitate for his fundamental rights. What was not clear from the record could be supplemented by affidavit and oral evidence and this indeed is a great forward march helping greatly the utility of writ proceedings. A caution is however necessary that this facility should not be allowed to be abused. A summary remedy will then become one of prolonged trial. The courts can be relied upon to permit further evidence only in proper cases where it is necessary to further ends of justice.

IF A PETITION UNDER ARTICLE 226 IS DISMISSED AND NO APPEAL IS FILED, CAN A WRIT LIE UNDER ARTICLE 32?

The above question was left open by the Supreme Court in Ashwini Kumar Ghose and another v. Arabinda Bose and another[43], M. K. Gopalan v. State of Madhya Pradesh[44], and Purushottam v. B. M. Desai[45]. In Ashwini Kumar Ghose's case[43] the application to the Supreme Court was under Art. 32 for an alleged infringement of the right of the petitioners under Art. 19(1) (g) or alternatively under Art. 136 for special leave to appeal from a judgment of the High Court of Calcutta, rejecting their application for the same relief under Art. 226. The petitioner claimed the right of an advocate to plead and act on the original side of the Calcutta High Court in view of his being an advocate of the Supreme Court. A Special Bench of the Calcutta High Court negatived this right in the writ application filed under Article 226. As an advocate of the Calcutta High Court, while he can both plead and act on the Appellate side of the Court, he can only plead and not act on its original side. In the instant case[43] Shri M. Patanjali Sastri C.J., expressed the majority opinion of the Supreme Court and allowed the application in favour of the petitioner. But their Lordships disposed of the application, treating the proceeding as an appeal and added, "We desire to guard ourselves against being taken to have decided that a proceeding under Art. 32 would lie after an application under Art. 226 for the same reliefs on the same facts had been rejected after due enquiry by a High Court. We express no opinion on this point". (P. 370 A.I.R.).

In *M. K. Gopalan's case*[44], the petition was under Art. 32, questioning the validity of the prosecution against the petitioner under Sec. 420, read with Sec. 120 B or 109, I.P.C., as offending Art. 14. The Supreme Court held that

42. Justice Wanchoo in the instant Kavalappara case was against the idea of taking of evidence.
1. 1953 S.C.R. 1: A.I.R. 1952 S.C. 369.
2. 1955 S.C.R. 168: A.I.R. 1954 362.
45. 1955 (2) S.C.R. 867: A.I.R. 1956 S.C. 20.
See also *Mithan Lal v. State of Delhi* A.I.R. 1958 S.C. 682 (Here also the question was bypassed).

where a Special Magistrate under Sec. 14, Cr. P. C., has to try the case entirely under the normal procedure, no discrimination arises. It was brought to the notice of the Court that this question was previously raised before the High Court under Art. 226 and had been rejected. The Court, however, observed : (P. 364, A.I.R.).

" It is desirable to observe that the questions above dealt with, appear to have been raised before the High Court at previous stages by means of applications under Art. 226 and decided against. No appeals to this Court have been taken against the orders therein. Nothing that we have said is intended to be a pronouncement as to the correctness or otherwise of these orders nor to encourage the practice of direct approach to this Court, (*except for good reasons*) in matters which have been taken to the High Court and found against without obtaining leave to appeal therefrom ".

It will be seen that while in *Ashwini Kumar's case*[43], the question was bypassed since the application was in the alternative also under Art. 136, in the case of M. K. Gopalan[44], the Court did enter into the merits in petition under Article 32, though no appeal was filed as against the adverse order under Art. 226 proceedings in the previous stages of the case. An opinion was further expressed that in such cases, a direct approach to the Supreme Court under Article 32 will not be encouraged ' except for good reasons '. This, however, concedes that a direct approach is possible. The question is whether the exercise of the right under Art. 32 in such cases, depended upon the discretion of the Supreme Court or whether it is a remedy which the affected party can demand as of right.

This question again arose in *Purushottam* v. *B. M. Desai*[45]. The problem was whether Sec. 46 (2) of the Income-tax Act under which the Income-tax Officer issued the recovery certificate to the Additional Collector of Bombay, is void under Art. 13 (1) in that it offended Art. 22(1) and (2), Art. 21 and Art. 14 of the Constitution. The petitioner's father had been arrested for recovery of income tax arrears. The petitioner prayed for a writ of *habeas corpus* before the High Court of Bombay unsuccessfully. No application was made to the High Court for leave to appeal. The Supreme Court, however, issued the rule on the petition under Art. 32, subject to the question of maintainability. But actually the Court heard fully on the merits and held that no fundamental right was at all infringed. Das, C.J. (acting) said, (P. 22, A.I.R.), " In the view we have taken about the merits of the petition, it is not necessary for us to consider the question of its maintainability after the dismissal of the petitions under Art. 226, or to make any pronouncements on this occasion on the scope and ambit of Art. 32 of the Constitution in that situation ". The problem appears to raise the question whether an alternative remedy is a bar to the availability of the remedy under Art. 32.

Stated so, in a broad sense, decisions appear to be unanimous that in application of Art. 32, an alternative remedy is no bar. Thus in *Rashid Ahmed* v. *Municipal Board, Kairna*[46], where the petitioner who had been refused licence had not gone in appeal under Section 318 of the U. P. Municipalities Act 1916, the Supreme Court stated that while, no doubt, they will consider the existence of an alternative remedy in the granting of writs, yet as the powers given to that Court are much wider and are not confined to issuing only prerogatives, the Court can under Art. 32 give the remedy by appropriate ' directions or

46. 1950 S.C.R. 566.

orders'. Again in *Romesh Thappar* v. *The State of Madras*[47] the Supreme Court rightly asserted itself as the protector and guarantor of fundamental rights and stated that though the High Court, and the Supreme Court had concurrent jurisdiction in the matter of prerogative writs under Articles 226 and 32 respectively, a resort to the Supreme Court in the first instant without resorting to the High Court was perfectly valid.

But the question of alternative remedy is not so simple as that. In Rashid Ahmed's case[16], the licensee, instead of appealing under the appropriate statute invoked Art. 32, while in *Romesh Thappar's case*[47], instead of approaching the High Court, resort to the Supreme Court was had in the first instance for a breach of the fundamental right of free speech [Art. 19 (1) (a)]. Neither of these cases solve the problem in hand. When once a remedy under Art. 226 is chosen and an adverse order follows, is the affected party to appeal against that order or has he the additional right to directly seek the remedy under Article 32? That is the question.

The recent Supreme Court pronouncement in *K. K. Kuchunni alias Moopil Nair* v. *The State of Madras*[48] may be examined in the connection. In this case, the *Sthanee* proprietor of a *Sthanam* in Malabar as petitioner prayed for a writ of *mandamus* directing the respondents not to enforce the provisions of the Marumakkathayam Removal of Doubts Act 32 of 1955, which sought to make the Sthanam property as the joint Tarwad property of all the members. The petitioner had till then claimed the Sthanam as his individual property which claim was upheld by the Privy Council in prior litigations. The Act 32 of 1955 affected his right to property under Art. 19 (1) (f) and Art. 31. A preliminary objection was taken as to the maintainability of the petition that the petitioner should seek his remedy in the pauper suit filed by one of the respondents after passing of the impugned Act. The Supreme Court pronouncing its views on the preliminary point expressed itself in significant terms after considering the effect of its prior judgments in *Rashid Ahmed's case*[46] and *Romesh Thappar's case*[47] :

"Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any prerogative writs on an application under Art. 226 of the Constitution—as to which we may say nothing now—this Court cannot, on a similar ground decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right".

This opinion of the Court in effect lends great support to the view that under no circumstances can a party be denied his remedy under Art. 32. The fact that the party had an adverse order already under Art. 226 and that he did not further pursue the matter by way of appeal can be no criterion for the availability of Art. 32. The Supreme Court had further stated in *K. K. Kuchunni's* case[48], that 'the mere existence of an alternative remedy cannot

47. (1950) S.C.R. 591. The Supreme Court of India did not approve of the American practice requiring exhaustion of the remedies in Federal and State Courts before the Supreme Court of America is approached. *Urquhurt* v. *Brown,* 205 U.S. 179 and *Hooney* v. *Kolohan,* 294 U.S. 103 cited and considered.

48. Petition No. 443|1955, Supreme Court of India. (Petitions Nos. 40 of 1955 and 41 of 1956 were jointly heard and a common judgment on the preliminary issue pronounced on 4.3.1959). Reported in A.I.R. 1959 S.C. 725.

per se be a good and sufficient ground for throwing out a petition under Art. 32 if the existence of a fundamental right and a breach actual or threatened of such right is alleged and is *prima facie established in the petition*'.

So, if the argument is that in *K. K. Kuchunni's case*[48], there was only then a suit pending which may provide the alternative remedy and that it was not a case where the remedy under Art. 226 had been unsuccessfully pursued, the observations above quoted indicate that what was needed is whether a fundamental right is alleged and a breach thereof is *prima facie* established in the petition. An adverse order under Art. 226 can at best be only one of the factors but if the petitioner under Article 32 is able to *prima facie* establish a case for the enforcement of a fundamental right, the Supreme Court is bound under Art. 32 to consider the merits of the case.

We may further study the fundamental characteristics of Art. 32. For one thing, Art. 32 is in Part III of the Constitution unlike Art. 226. Clause (1) of Art. 32 declares it a fundamental right. Clause (4) of Art. 32 states 'the right guaranteed by this Article shall not be suspended except as otherwise provided by the Constitution'. Art. 359 is the only provision which allows suspension of the enforcement of fundamental rights during emergencies declared by the President's Proclamation. In Art. 226 (2) it is significantly stated that "the power conferred on a High Court by clause (1) shall not be in derogation of the power of the Supreme Court by clause (2) of Article 32".

So the extraordinary Power of Review under Art. 32 is subject to no other provision in the Constitution except during a national emergency. Articles 132 to 136 of the Constitution do not make any reference limiting the operation of Article 32. It may be said appeals by special leave are discretionary with the Supreme Court. An adverse order under Art. 226 is appealable only by special leave when no certificate is granted by the High Court. An alternative remedy by a statutory provision of appeal was considered as no bar to resorting to Article 32 in *Rashid Ahmed's* case[16]. A discretionary right of appeal under Art. 132 or 136 cannot in reason be expected to be a bar to invoking Art. 32. If that were so, will not Article 32 cease to be a fundamental right? While the Supreme Court is compelled to hear the application under Art. 32 on merits, such a course is not feasible always under the special leave provision. The remedy in the latter case is only discretionary and not mandatory.

The wide scope of Art. 32 offers a fundamental remedy which cannot be abridged or minimised except by a constitutional amendment. An argument may be advanced that what is guaranteed is only the right to move the Supreme Court under Art. 32 and so if there were a prior adverse order under Art. 226, the petition under Art. 32 can be dismissed *in limini* without going into merits. But really Art. 32, clause (1) guarantees right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by that part. So, both the motion and the remedy for enforcement of the rights are guaranteed. It is pertinent to quote Fazl Ali J. in *Gopalan* v. *State of Madras*[49], where he says :

"The right to move this Court is given to a person not for the sake of moving only, but for moving the Court for enforcement of some rights by Part III and this Court has been given power to issue directions or orders or writs for the enforcement of such rights". More clear was the statement of the Court in K. K. Kuchunni's case while dealing with Art. 32 : "This Court may say

49. A.I.R. 1950 S.C. 27 at 124: 1950 S.C.R. 88.

that any particular writ asked for is or is not appropriate, or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss this petition. *In both cases this Court decides the petition on merits.*"

So, it may be said that at best the dismissal of a prior writ petition under Art. 226 may throw a doubt as to the right claimed and remedy demanded, in an application under Article 32. Those factors may have to be considered by the Supreme Court along with other facts and explanations offered by the petitioner. In any event, the Supreme Court cannot dismiss a petition under Art. 32 *in limini*. It has to necessarily adjudge on mertis.

The observations of Chagla, C.J., in *In re Prahlad Krishna*[50], throw further light on the problem as they clearly state that the decision of the High Court refusing a writ or order under Art. 226 may be final *qua* the High Court but since the powers of the High Court and the Supreme Court are concurrent, notwithstanding the refusal of the High Court to enforce the fundamental right of a citizen, the latter can approach the Supreme Court under Art. 32 in its primary jurisdiction. Similarly, in an Assam case[51], when a *habeas corpus* petition was dismissed by the High Court and another petition was filed for leave to send the petition to the Supreme Court, the High Court turned down the request as unnecessary, since the party had a clear right to directly approach the Supreme Court under Art. 32. We have thus the clear view of two High Courts[50-51] affirming the proposition that a direct resort to Art. 32 is permissible even though there is an earlier adverse order under Article 226 on the same facts. But the Supreme Court has yet to give a decided finding in this regard. In Dattatreya v. State of Bombay[52], when the High Court had dismissed a *habeas corpus* application and no appeal was filed therefrom, the Supreme Court entertained another petition under Art. 32 and dismissed it on merits. But no question of maintainability of the petition was at all raised in this case.

Yet another aspect may be considered. Art. 32 (1) guarantees the right to move the Supreme Court by "appropriate proceedings". What do the words 'appropriate proceedings' connote? Do they refer only to the proceedings referred in clause (2) whereby the Court can give directions, orders or writs etc. Clearly Art. 226 proceedings cannot come into the picture as the motion under Art. 32 (1) has to be to the Supreme Court. But can Arts. 132 and 136 be considered as 'appropriate proceeding'? The special leave under Art. 132 or 136 is given as a discretionary relief and is not guaranteed while the power under Art. 32 is guaranteed and mandatory, which the affected party can as of right demand. The words 'whichever may be appropriate' in Art. 32, clause (2) refers to writs of *habeas corpus, mandamus,* prohibition, *qua warranto* and *certiorari*. It is apparent the word 'appropriate proceedings' in clause (1) has to be read in conjunction with the provision in clause (2). So Art. 32 is self-contained and the power of the Supreme Court thereunder is in no way limited by any other provision in the Constitution.

It will be seen that the guarantee of the Constitutional remedy under Art. 32 is fundamental and real. The Supreme Court had no hesitation in Bisheshar

50. 1951 Bom. 25 Art. 27.
51. *Himamshu Bimal Mitra* v. *The State,* A.I.R. 1951 Assam 143.
52. 1952 S.C.R. 612 : A.I.R. 1952 S.C. 181. It may be noted in the Constitution of India no difference is sought to be made in Art. 32 as to the various kinds of writs. A writ of Habeas Corpus as well as a writ of certiorari (say affecting property rights) are subject to the same kind of further review.

Nath v. *C.I.T., Delhi and Rajasthan and another*[53], in declaring that no fundamental right can be defeated even by the doctrine of waiver. Art. 32 being a fundamental right, if a party chooses Art. 226 to provide the remedy, can he be said to have waived his right to invoke Article 32. Maybe the party loses in his petition under Art. 226 and does not choose to appeal. His right under Art. 32 can yet be availed of. The question may arise if this is then the correct position, parties who try the nearer remedy at home under Article 226 and fail, will prefer to come to the Supreme Court straight and the latter court will get flooded with too many writs. Should the party be allowed to dilly-dally with the choice of his remedies? If he chooses one, should he not pursue it to the end and not change his course in 'mid-stream?'

In *K. K. Kuchunni's case*[48], when the Supreme Court made the far-reaching declaration that it has the power to go into questions of disputed fact also under Art. 32, it made the following significant remarks :

"We are not unmindful of the fact that this court is bound to entertain a petition under Art. 32 and to decide the same on merits may encourage litigants to file many petitions under Art. 32 instead of proceeding by way of suit. But that consideration cannot by itself be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may *prime facie* appear to have been infringed".

So, where a fundamental right as Art. 32 is concerned, no question of alternative remedy, waiver, disputed questions of fact, or a prior adverse order under Art. 226 not appealed from, can bar the remedy guaranteed under Art. 32. The Supreme Court as the 'Sentinel on the qui vive'[54] to guard fundamental rights cannot possibly allow any abridgement of the right under Art. 32 by considerations such as whether an appeal has or has not been filed, whether leave to appeal has or has not been granted in all cases where Art. 226 had been resorted to in the first instance.

ARTICLE 226.

Certiorari to quasi-judicial tribunals.

In *Radheshyam Khare and another* v. *The State of Madhya Pradesh*[55] the Supreme Court made an important pronouncement as to the scope of *certiorari* in respect of quasi-judicial acts. It stated that the law is now well settled that a writ of *certiorari* will lie to control a statutory body which is not, strictly speaking, a court at all but which is by statute, vested with powers and duties that resemble those that are vested in the ordinary inferior courts if it purports to act without jurisdiction or in excess of it or in violation of the principles of natural justice or commits any error apparent on the face of the records, provided that on a true construction of the statute creating such body, it can be said to be quasi-judicial body entrusted with quasi-judicial functions. It is equally well settled that *certiorari* will not lie to correct the errors of a statutory body which is entrusted with purely administrative functions. There are three requisites each of which must be fulfilled in order that the act of the body may be quasi-judicial act, namely, that the body of persons (1) must have legal auhtority, (2) to determine questions affecting the rights of parties and (3 must have the duty to act judicially. Since a writ of *certiorari* can be issued only to correct the errors of a court or a quasi-judicial body, it would follow that the

53. Civil Appeal No. 208|1958.
54. Per Patanjali Sastri C.J., in *State of Madras* v. *V. G. Row* A.I.R. 1952 S.C. 196: (1952) 3 S.C.R. 597.
55. A.I.R. 1959 S.C. 107.

real and determining test for ascertaining whether an act authorised by a statute is a quasi-judicial act or an administrative act is whether the statute has expressly or impliedly imposed upon the statutory body, the duty to act judicially. The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute with the assistance of the general principles laid down in the judicial decisions. The principles deducible from the various judicial decisions are (a) that an authority not being a court in the ordinary sense, empowered by a statute to decide diputes between parties, there being nothing in the statute to the contrary, is under a duty to act judicially and the decision of the authority is a quasi-judicial act and (b) final determination by a statutory authority empowered to do any act which will prejudicially affect the subject will be a quasi-judicial act though there are no two parties and the contest is between the authority and the subject, provided the statute requires the authority to act judicially[55].

In the instant case[55] the above was the majority decision[56] which held that the function of the State Government under Sec. 53 A of C. P. and Berar Municipalities Act 11 of 1922 was administrative in nature and hence its action under the section is not amenable to the writ of *certiorari*. K. Subba Rao, J. however dissented from the majority view and stated that the duty to act judicially may not be expressly conferred but may be inferred from the provisions of the statute. It may arise in widely different circumstances and it is not possible to lay a hard and fast rule or an inexorable rule of guidance. Before the Government can take action under Sec. 53 A against an erring municipality three preliminary conditions for the exercise of the power must exist. They are : (1) the committee is not competent to perform the duties imposed upon it; (2) the State Government considers that a general improvement in the administration of the municipality is likely to be secured by the appointment of a servant of the Government; (3) an order stating the reasons therefor. The first condition depends upon the determination of an object test namely whether the committee is competent to perform the duties imposed on it. It is a jurisdictional fact that confers on the Government to take further action. The difference between Secs. 53 A and 57 in the matter of the duty cast upon the Government to give notice under the latter provision which is not so placed on the Government under the former is not decisive of the question whether the action of the Government under the former provision is judicial or administrative. The finding of incompetency carries with it a stigma on the municipal committee. The Government has to arrive at a finding of far-reaching consequence without giving an opportunity to explain to the persons who would be affected by such finding. Subba Rao, J. held for the above reasons that Sec. 53 A imposes a duty on the Government to act judicially in ascertaining the objective and jurisdictional fact, namely, whether committee is incompetent. We respectfully submit that the majority view ascribing the action of the Government to be completely administrative and not quasi-judicial is open to question. The finding as to competency of the committee is quasi-judicial and objective. A *certiorari* can, therefore, lie in such matters.

Who can apply under Art. 226.

The normal rule is that a petition can be made only by a person who has

56. S. R. Das, C.J., S. K. Das, and Kapur, J.J. The dissenting view was of Subba Rao J. with whom Justice Baghavaty agreed in the main.

some right and whose right has been infringed. There are some well-known exceptions to the rule. For instance, an application for a writ of *habeas corpus* may, in certain circumstances, be made by a near relation or friend of the person under illegal detention. So also, in the case of *quo warranto* the applicant need not always be the one who has suffered a personal injury. The issue in the latter writ is not the enforcement of any right in the applicant. What is in question is the right of the non-applicant to hold the office. Therefore, it is enough if the relator is a member of the public and acts *bona fide and* is not a mere pawn in the game having been set up by others. If the court is of the view that it is in the interests of the public that the legal position with respect to the alleged usurpation of an important public office should be judicially cleared, it can issue a writ of *quo warranto* at the instance of any member of the public[57]. In India the High Courts' power to do justice in such cases is further classified by the insertion of the words 'for any other purpose' in Article 226.

Certiorari inre proceedings under Sec. 176, Cr. P. C.

An enquiry held by a magistrate under Sec. 176, Cr. P.C. is neither a judicial nor a quasi-judicial proceeding amenable to a writ of certiorari[58]. The proceeding is nothing more than a fact-finding enquiry and it is optional for the magistrate holding the inquiry to make a report or not. The object of the enquiry is merely to furnish materials on which action might be taken or not and the report of the magistrate would by itself be purely of recommendatory character and not effective *proprio vigoral*. It does not dispose of the rights of parties and in fact neither the report nor the statements recorded therein would be admissible in evidence in any future proceedings. Hence no writ of *certiorari* to quash those proceedings can be issued[58].

Writ of certiorari.

Administrative orders cannot, it is true, be quashed by a writ of *certiorari* but such orders can be quashed by the court in exercise of the general powers conferred upon it under Art. 226 to issue directions and orders[59]. The supervision by *certiorari* touches two aspects, one being the area of the inferior jurisdiction, together with the qualifications and conditions of its exercise and the other being observance of the law in the cours of its exercise. In order, however, that an error of law may be corrected by *certiorari* it has to be an error apparent on the face of the record[60]. An alternative remedy is also no bar. But where it is not merely the position that an alternative remedy existed when the appellant approached the court but one where after moving the High Court for a writ and after obtaining a rule, he went to pursue simultaneously a parallel remedy by way of an appeal under the ordinary law and kept his recourse to the alternative remedy from the knowledge of the court up to the last moment no writ can issue even if the court were convinced on the merits that the appellant was entitled to a writ[60]. *Certiorari* will not also issue as the cloak of an appeal in disguise[61]. It merely seeks to prevent usurpation of jurisdiction by inferior tribunal and to ensure the observance of the rules of natural justice[61]. *Ceriorari* and *Mandamus* will lie if the inferior

57. *Bindra Ben and others* v. *Sham Sunder and others* A.I.R. 1959 Punj. 83.
58. *P. Rajangam* v. *State of Madras* A.I.R. 1944 Mad. 37. ruling A.I.R. 1944 Mad. 37.
59. *The Sunni Central Wakf Board U. P. etc.* v. *Intizar Husain and others* A.I.R. 1959 All. 16.
60. *P. C. Ray and Co. (India) Private Ltd.* v. *I.T.O. and another* A.I.R. 1959 Cal. 131.
61. *The Malabati Tea Estate* v. *Smt. Budhni Munda and others* A.I.R. 1959 Tripura 16.

authority has taken into consideration matters outside the ambit of its jurisdiction and authority beyond the matters which it was entitled to consider[62]. The correctness of the decision of the Tribunal on the jurisdictional issue can be examined in *certiorari proceedings*[63], though the High Court cannot act as a court of appeal and substitute its findings on disputed questions of fact for those which the Tribunal is bound to record and to record correctly[63].

The customs authorities in making assessment were held to be primarily an administrative body[64], but in so far as they sought to revise the assessment or impose penalty for an alleged misdirection, after giving the petitioner an opportunity of being heard, they performed their functions as quasi-judicial body subject to *certiorari jurisdiction*. The High Court cannot interfere in disputed questions of fact, but if there is an attempt to assess the duty under a wrong heading, in an arbitrary manner, and if this is clear upon the admitted facts, the court has ample jurisdiction to interfere.

Manifest error is a ground for exercise of the power of *certiorari*. But no hard and fast rule can be laid down to determine what is manifest error of law and what is mere error of law[65]. If the error contains the reasons and it is in the nature which has been characterised by English courts as speaking order it is open to the High Court to examine the reasons and come to its own conclusion whether an error of law has been committed by an inferior tribunal, calling for its interference under Art. 226.

Writ of Mandamus.

Normally, a writ of *mandamus* does not issue to or on order in the nature of *mandamus* is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty[66]. A public utility concern is not in the same position as a private body. The statutory duty, devolving upon a public utility concern is a public duty. Therefore, a writ can issue at the instance of any consumer to a public utility concern for its failure to perform its duty under the statute or under its licence[66]. Similarly, a writ can issue to it restraining it from abusing its powers under any of the provisions of the Act or under its licence.

ARTICLE 136.

Scope of Article 136.

In an appeal filed by special leave under Article 136, it is not normally open to the appellant to raise questions of fact or to ask for interference by the Supreme Court with concurrent findings of fact, unless the findings are vitiated by errors of law or the conclusions reached by the courts below are so patently opposed to well-established principles as to amount to a miscarriage of Justice[67].

In M|s Bengal Chemical and Pharmaceutical Works, Ltd. v. The Employees[68] the Supreme Court emphasised that Art. 136 does not confer any right of

62. *Prafulla Mohan Mukerjee* v. *I. G. of Police W.B.* A.I.R. 1959 Cal. 1.
63. *Varadarajaswami Temple etc.* v. *Sri Kushnappa Govinda and others* A.I.R. 1959 Mad. 40.
64. *Messrs. Calcutta Chemical Co. Ltd.* v. *The Asst. Collector of Customs and others* A.I.R. 1958 Cal. 694.
65. *Dinesh Chandra Dourch* v. *A. M. Dam* A.I.R. 1959 Assam. 61.
66. *Corporation of the City of Nagpur* v. *The Nagpur Electric Light and Power Company Ltd. Nagpur* A.I.R. 1958 Bom. 598.
67. *Ratan Gond* v. *The State of Bihar* A.I.R. 1959 S.C. 18.
68. A.I.R. 1959 S.C. 644.

appeal but confers a discretionary power to the Supreme Court to grant special leave to appeal. It is implicit in the discretionary reserve power that it cannot be exhaustively defined. It cannot be so construed as to confer a right to a party where he has none under the law. The discretionary power has necessarily to be used for the furtherance of justice and the object of the statute impugned. Thus the Industrial Disputes Act is intended to be a self-contained one and it seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given on circumstances peculiar to each dispute and the tribunals, are to a large extent, free from the restrictions of technical considerations imposed on courts. A free and liberal exercise of the power under Art. 136 may materially affect the fundamental basis of such decisions, namely, quick solution to such disputes to achieve industrial peace. Though Art. 136 is couched in widest terms it is necessary for the Supreme Court to exercise its discretionary jurisdiction only in cases where awards are made in violation of principles of natural justice, causing substantial and grave injustice to parties or the case raises an important principle of industrial law requiring elucidation and final decision by the Supreme Court or discloses such other exceptional or special circumstances which merit the consideration of the Supreme Court. Mere grant of special leave *ex parte* is no final declaration of the right to appeal.

ARTICLE 37.

In Deepchand v. State of U.P.[69] the Supreme Court reiterated the principle stated in State of Madras v. Smt. Champakam Dorai Rajan[70] that the Directive Principles of State Policy cannot override the provisions in Part III of the Constitution. The Legislative Power of a State is guided by these directives. The directions even if disobeyed by the State cannot affect the legislative power of the State as they are only directive in operation and scope.

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69. A.I.R. 1959 S.C. 648.

70. A.I.R. 1951 S.C. 226 : 1951 S.C.R. 525.

CHAPTER XIII

CRITICAL REVIEW OF LIMITATIONS ON FUNDAMENTAL RIGHTS

It is but apposite that due emphasis is laid on fundamental rights of a citizen in a democratic welfare State. When we refer to a democratic welfare State, the concept of the fundamental rights of a citizen has necessarily to be subject to certain adjustments and limitations, so that society as a whole might progress towards the ideal welfare State. We may state that a citizen's fundamental obligations are as important as fundamental rights.

The Indian Constitution envisages a Charter of Fundamental Rights in Part III assuring the citizen of those rights subject to certain restrictions in the interests of the public. Part IV of the Constitution incorporates the Directive Principles of State Policy, which are verily in the nature of instrument of instructions to the Government of the day to put into practice the objectives scheduled therein for promoting a truly welfare State. Fundamental Rights and Directive Principles of State Policy have been fashioned in our Constitution to promote an orderly society functioning on accepted principles of the Rule of Law.

The Rule of Law.

The concept of the Rule of Law according to Dicey involves three cardinal principles, (1) The Supremacy of the Law, (2) Equal application of the Law, (3) the predominance of the Legal Spirit which as in England is assured by judicial decisions determining the rights of the individual or as in America and India the rights are enshrined in Constitution of the land. Dicey's concept of supremacy of Law was originally based only on the machinery of the ordinary courts of law. But later day developments in the modern era have demonstrably proved that special courts and administrative tribunals are imminently necessary if the demands of a growing industrial society have to be met and if individual justice has to be adjusted with social justice in a fast moving age. The recent meet at Delhi of the International Commission of Jurists in January 1959 has emphasised in what is called 'The Declaration of Delhi' that the Rule of Law is a dynamic concept to safeguard and advance the civil and political rights of the individual in a free society. Its further objective is to establish social, economic, education and cultural conditions under which the citizen's legitimate aspirations and individual dignity may be realised. In any scheme of socialistic advance, the cardinal principle is that progress should be compatible with the recognition of the individual dignity of the free man. Regimentation and State interference which minimises or abrogates this concept of the personal dignity is negation of the Rule of Law. Maybe, socialism of the Communistic Countries may consider the State as paramount to the exclusion of the personal dignity of the citizen but in Common Law Countries such as England, America and India the individual is as important as the State except that the former has certain fundamental obligations towards the welfare of the State. But at no time should

these fundamental obligations eclipse his individual self. If the obligations go to the extreme limit of obliterating the fundamental right itself, then we may say that the basic spirit of the Rule of Law is negatived.

Concept of Fundamental Rights.

We may now advert to the concept of fundamental rights as enshrined in the Constitution of India. They can be broadly classified as Right to Equality (Arts. 14-18), Right to the six freedoms of speech, expression and assembly, association, movement, residence, acquisition and holding of property, practising of any profession, occupation and trade (Article 19); Personal liberty (Articles 20-22); Right against exploitation (Articles 23-24) : Right to freedom of Religion (Arts. 25 to 28) ; Protection of cultural and educational rights of minorities (Arts. 29 to 30); Right to Property (Art 31) and Right to enforce all the above fundamental remedies by constitutional means. This statement of Fundamental Rights in the Constitution vests them with a sanctity which legislators will not violate by interference in a light-hearted manner. It is a standing reminder to the executive as well as the people that certain things must be respected and certain others ought not to be done. This Charter is the sheet anchor for a young democracy like India. But democratic government by the people for the people has verily to steer round the pitfalls of totalitarian authoritativeness which in the first slush of enthusiastic democratic governmental power may tempt even the well-intentioned patriot. Lest authority should corrupt, constitutional limitations on power is the safety valve for the essential well-being of free citizens. But then under the Constitution if the authority resort to frequent constitutional amendments tinkering with the important provisions of the Charter, it will be indeed a very sad portent.

It must be remembered that the object of these fundamental rights, as emphasised in Motilal v. Uttar Pradesh (A.I.R. 1951 All. 257) was not merely to provide security to and equality of citizenship of the people living in this land and thereby helping the process of nation-building but also to provide certain standards of conduct, justice and fair play. They were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privilege and has laid down that there is to be perfect equality between one section of the community and another in the matter of all these rights which are essential for the material and moral uplift of man.

The six safeguards for liberty.

To uplift the individual man and protect his liberty and also to fashion out a progressive nation six requisites may be mentioned. The first safeguard for liberty is the existence of law which will safeguard it and secondly, an independent judiciary to uphold the law, against any transgression by a private individual or by the Executive Government. Thirdly, it may be stated that the form of Government most suited to encourage the exercise of these liberties is a democratic form of governance as it is a form in which political power is with the mass of the people. But there is an inherent danger in democracy to be safeguarded in that the majority rule may deteriorate into one of tyranizing the minority. Hence in the ultimate analysis the habit of tolerance should be widespread in the community to ensure true liberty to be enjoyed by the citizen. The fourth requisite for safeguarding liberty is the development of self-governing institutions—Laski, pithily says "the more widespread the distribution of power in the State, the more decentralised its character, the more likely men are to be zealous for freedom". This is the character, of all federal democracies in contradistinction to centralization of powers characteristic of autocracies. The modern communistic governments while they proclaim equality

to the common man, nevertheless have centralised governmental power given to a chosen few who hold rigidly the reigns of Government, so as to regulate and sometimes petrify the exercise of the civil liberties of the common man. The fifth requisite for safeguarding liberty is the declaration of fundamental rights included as part of a written constitution. These rights are to be permanent and not transient. They can be restricted only to the extent of safeguarding the enjoyment of these rights by another citizen and in safeguarding public interest. But over and above all the above safeguards, the most important safeguard for liberty is the vigilance of the citizen to uphold his rights and carry out his obligations in a truly welfare State.

In India fortunately we have all the above characteristics for ensuring liberty. It is not enough we have a schedule of Fundamental Rights in the Constitution. It must be made easily available and practicable by the people without executive or administrative hindrance. The judiciary has necessarily to be the guardian of the people's liberty. The people themselves should exhibit eternal vigilance in seeing that these fundamental rights are not whittled down. While the State can expect subordination of the individual citizen's self in certain spheres and at certain times for the betterment of the welfare State, it will be a sad day when the action of the State reduces the individual's fundamental right to a mere phantom on the specious plea of public benefit. That will be the language of communistic ideology and that language can hardly fit in with the concept of a social democratic Republic as India.

The Rule of Law and the Judiciary.

Let us now consider the role of the judiciary in a democratic welfare State. Fundamental rights as well as the limitations on those rights in public interest have necessarily to be very vigilantly scanned by the judiciary in order to hold the balance even between the individual and the State.

It is a trite saying that the visible symbol of sovereignty is in a Country's independent courts of justice while the disappearance of that symbol marks the end of the rule of law heralding a jungle State. To be frank a civilized State exalts itself to the extent it exalts the position of the judiciary of the land. The body politic must needs develop a sense of legalism i.e., a general willingness to yield to the authority of law courts. In Dicey's words 'a Federal system (Indian Republic is one such) can flourish only among communities imbued with a legal spirit and trained to reverence the law'. Even the executive derive their strength from an adherence to the rule of law. There is a ring of truth, now applicable to conditions in India, in Dicey's dictum that 'yet any nation which cannot acquiesce in the finality of even possibly mistaken judgment is hardly fit to form part of a federal State'. But we should follow the three golden rules enunciated by Prof. Beridale Keith that there are three limiting guiding principles for our guidance—

(1) The judicial decisions should be upon fixed principles already established.

(2) Legislation must favour the limitation of the executive power and the judicial power to deal arbitrarily with individual rights.

(3) The Government should jealously respect its legal limitations.

We may echo the sentiments of The Honourable the Chief Justice Mr. M. Patanjali Sastri expressed in State of Madras v. V. G. Row (1952 S.C.J. 253 : 1952 S.C.R. 597) :—

"What is sometimes overlooked is that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the wider interpreted 'Due Process' Clause in the fifth and fourteenth Amendments. If then the Courts in this Country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit in the discharge of duty plainly cast upon them by the Constitution. This is especially true as regards 'the fundamental rights as to which this Court has been assigned the role of a sentinel on the 'qui vive'. While the Court naturally attaches great weight to legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

It is well that the principle enunciated in Sunil Kumar v. W. B. Government (A.I.R. 1950 Cal. 274) is recognised that it is the duty of the Court to stand between the subject and any encroachment of his liberty by the executive or any of the authorities however high. The citizen has to be vigilant enough not only to protect himself from the arbitrariness of an executive or administrative order but also sometimes from the arbitrariness of the judiciary. A strong bar and a live public opinion can alone cure any arbitrary tendency on the part of the judiciary. The judges must be deemed to be not only the guardians of the rights of the people and of the State but at any given moment they must be deemed to be the masters of the Constitution. To make them function at such a level the role of a strong and independent bar cannot but be emphasised. Where their judgments affect fundamental rights, it is apposite that they are subject to the keenest research by jurists. The Press can also perform here a helpful role in focussing the issues to the public in a constructive manner. The judiciary, after all, are very keen to do all that is just and legal. Maybe, the politicians may sometimes criticise the judiciary and try to woo them into the quick sands of untried socialism. But a live public opinion and authoritative opinions expressed by the jurists can help the judges in determining problems facing a socialistic welfare State.

It is therefore our purpose to scan the fundamental rights assured to the citizen from the standpoint of its real availability to the citizen and of the related problem of the limitations to such rights in public interest. While limitations to rights to serve a public purpose is to be welcomed, the arena of such limitations should also not be allowed to grow out of all proportions to the needs of an occasion so as to eclipse the right itself. Of course, in war conditions all rights are suspended for a period. But such a state must not be introduced in peace time on the specious plea of national progress at the expense of the individual citizen's liberty. As we stated, advertising to the Delhi Declaration of International Jurists "the Rule of Law should always respect the individual dignity and liberty of the citizen" without which any amount of the so-called national progress is worth nothing.

ARTICLE 13.

The Law of Ultra vires.

The Rule of Law is assured by Article 13 of the Constitution which gives power to courts to strike down all laws inconsistent with the provisions of Part III of the Constitution as *ultra vires* of the latter. The term laws include ordinance, order, bye law, rule, regulation, notification, custom or usage having the force of law.

Article 13 is the sheet anchor of the Chapter on Fundamental Rights. It declares the power to veto any law which is inconsistent with that Chapter (Part III of the Constitution). This is indeed a great power vested in the judiciary to declare such laws *ultra vires*. But unfortunately the Supreme Court in its decision in Shankari Prasad v. The Union of India[1] stated that the word 'law' in Art. 13 does not include 'constitutional Law' though Patanjali Sastri J. pointed out that 'Law must ordinarily include Constitutional Law'. The decision of the Court was motivated to harmonise the provisions in Art. 13 and Art. 368, since the latter article does not exclude Part III from the scope of the amending power. Article 13 inhibits a law '*taking away* or *abridging*' fundamental rights. There is no prohibition to the adding or widening of the fundamental rights. What is sacrosanct and irreducible minimum is the Charter of Rights as enshrined in the original Constitution. If the Supreme Court had construed that 'Law' includes 'Constitutional Law', then there can be no amendment possible of the enshrined rights in Part III. But by such a construction the other danger created is Parliament has now the power to amend or annihilate any or all of the Rights in Part III of the Constitution. Should such a right be yielded to Parliament to override what the founding fathers had declared as the irreducible minimum of the fundamental rights for the citizen of India? Maybe, Parliament is endowed with wisdom not to attempt it. But the ballot box in an underdeveloped country as in India may hold surprises and the Legislators may not be always immune from such lapses to the hazard of the community at large. In Shankari Prasad's case the First Constitutional Amendment Act of 1951 was held *intra vires*. The Amendment introduced Articles 31-A and 31-B with the object of withdrawing 'Estates' (Zamindari interests) from the purview of the fundamental right to property. But the Constitutional Fourth Amendment made great inroads into the realm of right to property, Article 31 having been mutilated to a hazardous degree, making compensation not justiciable at all. It is the Supreme Court's decision in Shankari Prasad's case that led to this result. There was indeed nothing inconsistent between Art. 13 and Art. 368 when all that was stated in Art. 13 was against 'taking away' or 'abridging' the rights. The part of the legislature to add was intact. The self-imposed limit of judicial interpretation in Shankari Prasad's case gradually led to Parliament cancelling even the justiciability of 'compensation' in the matter of compulsory acquisition by the State of a citizen's property. A constitution must be sacred and sacrosanct and it is the duty of the court not to allow any tinkering with constitutional guarantees. But in India the damage started with Shankari Prasad's case and as it will be seen in the discussion below much of the worry is due sometimes to the want of assertion of the existing judicial power. The citizen cannot help Legislative inroads in the realm of his constitutionally guaranteed freedoms except at the ballot box. There is no provision for recall or referendum in the Constitution unless there is Presidential intervention under emergency provisions to dissolve the legislatures. But the judiciary, independent and bold as it can be, can certainly in the field of interpretation, keep alive the spirit as well as the letter of the Constitution, vouchsafing to the individual his guaranteed liberties. The judiciary is the last bulwark of the rampart of freedoms of the individual in a democratic welfare State.

The question may be raised if Parliament cannot resort to amendment of the Provisions of Part III of the Constitution, is Part III to exist as it is for all time?

1. 1952 S.C.R. 89.

This may be answered by the fact that it is the people of India who gave unto themselves the Constitution through the machinery of a Constitution Assembly. A provision like the power of referendum on a particular issue, can as well be incorporated by a Constitutional amendment and the people themselves be asked to reconsider by the instrumentality of a referral any specific problem that may affect the provisions in Part III. A National convention specifically called for the purpose may not be a practical proposition in such a largely-populated country as India.

ARTICLE 14.

Equality before Law.

Equality before law or the equal protection of the laws is guaranteed by Article 14. Equal protection signifies the right to equal treatment in similar circumstances[1a] both in the privileges conferred and in the liability imposed by the laws.[2] The principle of Equality does not mean that every law must have universal application for persons of varied nature, attainment and circumstance. It can only mean equal treatment for persons similarly placed[3]. This involves an examination of the classification of the persons. The legislature has doubtless to have the power for making special laws to attain particular objects and towards this end has necessarily to exercise large powers of selection or classification of persons. The citizen has to be protected from unreasonable classification, though he has necessarily to subject his fundamental right for equal treatment to the limitation of legal and proper classification. It is the function of the court to scan what is reasonable and what is not.

Every classification 'per se' may carry some amount of inequality but the yardstick to be applied by court is the test of reasonableness. It is difficult to exhaust the circumstances or criteria which can afford a reasonable classification in all cases. An attempt has been made by the Supreme Court in Ramakrishna Dalmia v. Justice Tendolkar[4] to summarise classifications which have been hitherto held as valid. They fall into five heads :

1. A statute may itself indicate the person or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or from the surrounding circumstances known to be brought to the notice of the court. The test to be applied by the Court is if the classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute[5], it does not matter if the statute is intended to apply only to a particular person or thing or only to class of persons or things, e.g., Chiranjitlal's case,

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1a. *Shrikishan* v. *State of Rajasthan* (1956) S.C.A. 402.
2. *State of West Bengal* v. *Anwar Ali* 1952 S.C.R. 284. *Chiranjitlal* v. *Union of India*, A.I.R. 1951 S.C. 41.
3. *State of Bombay* v. *Balsara* 1951 S.C.R. 682.
4. A.I.R. 1958 S.C. 539.
5. *Chiranjitlal* v. *Union of India*, A.I.R. 1951 S.C. 41; *State of Bombay* v. *F. N. Balsara*, A.I.R. 1951 S.C. 318; *Kedarnath Bajoria* v. *St. of W. Bengal*, A.I.R. 1953 S.C. 404; *V. M. Syed Mohammad & Co.* v. *State of Andhra*, A.I.R. 1954 S.C. 314, *Bhudan Chaudhry* v. *State of Bihar*, A.I.R. 1955 S.C. 191.

Balsara's case, Kedarnath's case, Syed Mohammed's case and Bhudan Choudhry's case[5].

2. Where a statute directs provisions against one individual person or thing or to several individual persons or things with no reasonable basis or classification it is a case of naked discrimination[6] e.g., Ameerunnissa Begum's case and Ramprasad's case[6].

3. Where a statute makes no classification at all but leaves it to the discretion of the Government to select and classify, if there is no principle or policy laid down for the guidance of the exercise of discretion by Government, the Court will strike down the statute as *ultra vires*[7] e.g., cases of Anwar Ali Sarkar, Dwarka Prasad and Dhirendra Kumar.

4. But where such principles are laid down with a discretion to Government to apply the principles for classifying, the statute will be upheld[8] e.g., Kathi Raning Rewat's case.

5. But where the Government makes the classification without applying the said principle, the statute is quite valid but the executive action will be unconstitutional[9] e.g., Kathi Raning Rewat's case.

It will be thus seen that the limitation on the concept of Equality before law is found in the individual being subjected to a reasonable classification and a certain curtailment of his fundamental right to enable the object of the statute in a welfare State to be achieved. But it can easily be seen that this powerful weapon of classification in the hands of a biased administrator may as well render the fundamental right of equality a mere shadow. Judicial decisions have gone to the length of recognising that it is enough if principles are laid down in the statute and executive application should conform to these principles. But discretionary power is a mercurial weapon. An English statesman had once remarked that discretionary power in a judge is a synonym for tyranny. If this could be said of the judge, it must indeed be worse if the discretion in such an important matter as 'classification' is yielded to an officer instead of being clearly stated in statute itself.

There is a criticism that Part III of the Constitution is more a Chapter on constitutional limitations than constitutional rights. While the fundamental rights can be subject only to reasonable restrictions, discretionary exercises of power should be greatly discouraged. The onus of malafide exercise of the discretionary power by the executive is often thrown on the citizen challenger. It is often impossible to prove malafides. It would be more appropriate if the onus is also on the officer to show that the exercise of the powers was rational and above board.

Legal Aid.

It must be understood that Article 14 is a great potential source of judicial power available for regulating administrative discretion. While the Constitution

6. *Ameerunnissa Begum* v. *Mahboob Begum*, A.I.R. 1953 S.C. 91; *Ramaprasad Narain Sahi* v. *State of Bihar*, A.I.R. 1953 S.C. 215.
7. *State of W.B.* v. *Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75; *Dwarka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 224; *Dhirandra Kumar Mandal* v. *Supdt. and Remembrancer of Legal Affairs*, A.I.R. 1954 S.C. 424.
8. *Kathi Raning Rewat* v. *The State of Saurashtra*, A.I.R. 1952 S.C. 235.
9. *Ibid.*

has only laid broad principles, it is for the judiciary to see that the law and 'the administration of law' is in conformity with those principles. It has however to be admitted that the first ten years of the working of the Constitution had indeed given umpteen chances to the judiciary to regulate the law and the administration of the law in consonance with the tenets laid in Article 14. It is the duty of the judiciary to exercise constant vigil and exercise its admitted powers to the extent most necessary to safeguard the constitutional guarantees in Part III of the Constitution. But has the judiciary accomplished this? There is much truth in what Bose, J. stated in Bidi Supply v. Union of India[10]. "The only question is whether these sections contravene Art. 14. Despite the constant endeavour of judges to define the limits of this law, I am unable to deduce any clear-cut principle from the oft-repeated formula of classification. As I have said in another case even the learned judges who propounded that theory and endeavour to work it out are driven to concede that classification in itself is not enough for the simple reason that anything can be classified and every discriminatory action must of necessity fall into some category of classification, for classification is nothing more than dividing off one group of things from another and unless some difference or distinction is made in a given case no question under Article 14 can arise. It is just a question of framing a set of rules".

It has to be stated that very often the fetish for classification and finding a reason for such classification, has practically reduced the efficacy of Article 14. The yardstick of reasonable classification must be made severe and strong. If the yardstick is mercurial then almost any classification can be justified and Article 14 rendered a mercurial right not easily available as a protection to the citizen. Bose, J. very pithily put it[11]. "It is elementary that no two things are exactly alike and it is equally obvious many things have features in common. Once the lines of demarcation are fixed the resultant grouping is capable of objective determination but the fixing of the lines is necessarily arbitrary and to say that Government and legislatures may classify is to invest them with a naked and arbitrary power to discriminate as they please. Faced with the inexorable logic of this position, the learned judges who apply this test are forced to hedge it round with conditions which to my mind add nothing to the clarity of the law".

There is of course the basic criteria that a classification to be reasonable must be founded on an intelligible differentia which distinguishes those that are grouped together from others. That differentia must also have a rational relation to the object sought to be achieved by the Act[12]. The classification should never be arbitrary, artificial or evasive. It must rest upon real and substantial distinction bearing a reasonable and just relation to the thing in respect of which the classification is made[13]. The selection or differentiation must never be arbitrary and should rest upon a national basis having regard to the object which legislature has in view[14]. Then alone it is possible to put in practice the oft-quoted words of Sir Ivor Jennings, "among equals the law shall be equally administered and that like shall be treated alike". Bose J. summed up in the Bidi Supply case[10] "with the utmost respect all this seems to me to break down on a precise analysis for even among equals a large discretion is left to judge in the matter of punishment, and to the police and the State whether to prosecute or not and to a host of officials whether to grant or withhold a permit or

10. A.I.R. 1956 S.C. 479 at 484.
11. *Ibid*, at p. 485.
12. *State of W. B.* v. *Anwar Ali*, A.I.R. 1952 S.C. 75.
13. *Ibid*, at p. 88 (Mukherjea J.).
14. *Rama Prasad Narayan* v. *State of Bihar* A.I.R. 1953 S.C. 215 at 219 (Mukherjea J.).

licence. In the end having talked round and around the Article we are no wiser than when we started ..... the truth is that it is impossible to be precise ". The ultimate conclusion reached by Bose, J. was thus stated :

" Article 14 sets out to my mind an attitude of mind, a way of life, rather than a precise rule of law ..... decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another tomorrow when the basis of society had altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and Art. 14 narrows down to a question of fact which must be determined by the highest judges in the land as each case arises[15] ".

Even if we may not wholly agree with the reasoning or conclusions of Bose, J., it has to be admitted the fetish of classification carried to an absurd length does indeed reduce the efficacy of Art. 14 to the prejudice of the citizen's claim to Equality in law and equal protection in law. A rigid compartmentalization of classification as has been analysed in Budhan Chowdry v. State of Bihar[16], or later in Rama Krishna Dalmia v. Justice Tendolkar[17] leaves very little outside its purview. Almost any case in hand can be lugged into the groupings suggested. Such rigidity leads to the eclipse of the right vouchsafed in Art. 14. That is why it is better to conceive of Article 14 as a broad principle of Equality, an attitude of mind to be applied to the needs of an occasion. Such elasticity will allow the doctrine of equality to grow, while compartmentalization by a rigid formula will eclipse its growth. In Rama Krishna Dalmia's case the impugned notification did not make out a case for reasonable classification. Affidavits were called to aid the court for determining whether there was a valid basis for treating the petitioners and their companies as a class by themselves. We had already adverted to the fact that in Chiranjit Lal v. Union of India singling out a particular company for discriminatory treatment was unfortunately justified. So classification can dwindle to one individual also ! In Qazim Rizvi v. State of Hyderabad[19] despite all the discriminatory procedure, the accused was still held to have had a substantial trial. The yardstick of reasonableness in that case seemed to reach a vanishing point ! While classification attempted in the statute itself falters and is open to attack[18], in certain other group of cases to leave it to Government to select and classify[20] leaves the matter still more open to question, particularly when the statute does not lay down any principle or policy for guiding the exercise of discretion by the Government. It only reduces the matter to one of arbitrariness on the part of the Government. While in cases like State of W. Bengal v. Anwar Ali[20] the 'uncontrolled authority' to the executive to classify on the specious reason of speedier trial, was held *ultra vires*, in later cases the application of this doctrine has been rather diluted. There was undue deference to the Legislature and the executive and there was not much insistence on a clear and definite statement of policy within the law to guide administrative discretion. The impugned provision in *Kathi Raning* v. *State of Saurashtra*[21] was nearly similar to that in Anwar Ali's case[20]. Yet in the former

15. A.I.R. 1958 S.C. 539.
16. A.I.R. 1955 S.C. 191.
17. A.I.R. 1951 S.C. 41.
18. A.I.R. 1953 S.C. 136.
19. *Chiranjit Lal* v. *Union of India* A.I.R. 1951 S.C. 41; *State of Bombay* v. *F. N. Balsara* A.I.R. 1951 S.C. 318.
20. *State of W. B.* v. *Anwar Ali Sarkar* A.I.R. 1952 S.C. 75.
21. A.I.R. 1952 S.C. 123 : 1952 S.C.R. 425. See also *Lakshman Das* v. *State of Bombay* A.I.R. 1952 S.C. 235 : 1952 S.C.R. 710; *Kedar Nath* v. *West Bengal* A.I.R. 1953 S.C. 404 : (1954) S.C. 3.

the provision was held *intra vires*. 'Speedier trial' was held to be a vague policy in Anwar Ali's case while in Kathi Raning's case the words in the preamble 'to provide for the security of the State, maintenance of public order etc.' were held to be a clear and definite policy enabling Governmental discretion to dabble in classification. The limit to the exercise of executive discretion can be visualised in Pannalal Binjiraj v. Union of India[22]. The enunciation of the Law in Bidi Supply Company case[23] was given the go-bye in the former case. In the latter it was stated that transfer of an income-tax case caused expenses and harassment to an extent as to visit him with the reality of discrimination. In Pannalal's case, the Supreme Court said that mere transfer of an income-tax case was not discriminatory and that as the purpose of the Income Tax Act is to tax, assess and collect it, the matter has to be viewed as one of 'administrative convenience' for 'convenient and efficient assessment of income-tax'. Maybe, there is no discrimination when the transfer is from one officer to another officer within an area. But if it is to a different area there is definite hardship and discrimination. The power of the Board of Revenue was said to be controlled by the purpose which is to be achieved in the Act itself namely a 'more convenient and efficient collection of the tax'. Can 'administrative convenience' control 'administrative discrimination'? Though in Pannalal's case the principle that the Legislative should state the policy to regulate administrative discretion to effect classification for discriminatory legislation has not been repudiated, however its utility has been rendered dubious by the seal of approval being given to 'administrative convenience' as an adequate test. It was further explained by the Supreme Court that no one has a fundamental right to be assessed at his place of residence or business. But it was forgotten that Article 14 was in itself a fundamental right. The assessee had a right to be treated alike and equally with other assessees. If the judiciary sanctions vague legislative policy directives to the executive, as valid and the application of the policy is further diluted in the choice of factual situations for application of the policy, it must be admitted that judicial control is rendered innocuous.

Equal protection may be denied by substantive as well as procedural laws. It may take place in the administration of the Law also. But to make this protection real, there must be equal facility for easy access to courts of law for redress. The fundamental right of equality vanishes as one of no substance or practical utility if the aggrieved party is unable to expend for the redress. Are fundamental rights only for the rich? In a social welfare State the poorest must be given equal access to court. This can be done only if legal aid given on a liberal scale to the deserving persons. In India there is very little of this in contradistinction to conditions in America, where most of the money came from the community. In England there was a fair response from State and county funds in this regard. In underdeveloped countries like India the mantle of organising legal aid must necessarily fall both on the State and the community. The recent Delhi Declaration by the International Jurists rightly adopted Mr. K. M. Munshi's view, that though the primary responsibility of organising legal aid may be on the Bar, State help and the community's help must be made substantially available, for effectively providing legal aid for the poor and the indigent. We plead for a Central legislation on this important topic of legal aid.

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22. A.I.R. 1957 S.C. 397 : 1957 S.C.R. 233.

23. 1956 SC.J. 492 : 1956 S.C.R. 267.

ARTICLE 15.

The Law of non-discrimination.

In regard to Article 15 which postulates prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth (e.g., access to shops, public restaurants, public places, wells, tanks etc.) the two limitations are (1) that the State can make special provision for women and children, (2) for any socially and educationally backward classes, or schedule castes or tribes. The last clause was introduced by the Constitutional First Amendment of 1951 to bring it in line with Art. 29(2) which protects cultural and educational interests of minorities on the same lines as Art. 15. The provisions in Arts. 15 and 29 are indeed wholesome unless the limitations are abused. What are backward classes is not defined in the Constitution. Under Art. 340 the President is empowered to appoint a commission to investigate the conditions of socially and backward classes and on the report of the Commission the President announces the list of backward classes. In actual practice it is seen in some States political pressure is sought to be used for declaring almost all the communities as backward. Sometimes it is equated with Varna. But actually there can be backward classes even in certain areas, of Brahmins and Kshatriyas. May be, the predominantly backward people are some of the lower strata of the non-Brahmin community. But there are also many forward sections of the non-Brahmin community.

Since political power is apt to be misused, a safeguard in the limitation in Art. 15 (4) is to include the word " reasonable " before the words ' special provision '. The word ' reasonable ' will indeed provide judicial review in cases of abuse of this power of classification. It may be that if a classification is proved to be unreasonable and malafide and it is shown to the Court that it does not help the really backward classes but some others who are made to parade as backward, then the Court may be justified in treating such classification as *ultra vires* of Art. 15, particularly when the real object of discrimination against other citizens is apparent. But to enable the Court to effectively go into the matter the word ' reasonable ' is necessary before the words ' special provision '. It may also be considered whether these special clases for backward classes should not have a time-limit, say a ten or 15 years' period. In a democracy merit should be harnessed to quicken progress and the 'Backward Classes' theory must not be pushed too far at the expense of progress. A time limit might satisfy both aspects of the cases. The decision in Joshi v. State of Madhya Bharat[24], appears to sanction discrimination on the ground of residence since Art. 15 and Art. 29 do not contain that category. In the instant case it must be noted that Jagannath Das in his dissenting judgment stated it offended at any rate Art. 14. The purpose of classification should be to minimise inequality and not to produce an obvious discrimination through geographical classification.

A similar problem arises in Art. 16 where equality of opportunity is assured in matters of public employment irrespective of race, caste, religion, sex, place of birth or residence. The exceptions to this are covered by clauses (3) to (5). The State may fix by Union legislation the condition of residence in a State for any particular office. It can reserve appointments for backward classes. The article does not apply to an office in a religious or denominational institution. The provision as to residence is intended to increase efficiency and permanency. It will prevent citizens of a State from needlessly running from State to State in search of employment. Nearer their home they are likely to do better

24. 1956 S.C.R. 998.

service. The power is vested only in the Union Parliament to facilitate uniformity and it does deal only with State services and not Union Services. As we stated already the 'backward class' Reservation must not be allowed to run till eternity. It should not become a fetish and be exploited. We move forward as a nation not as so many forward classes, backward classes, brahmins, castes other than brahmins etc. That will spell disaster to national efficiency. We have to consider ourselves as Indians first and last. The initiate even in the so-called 'backward classes' to shoot up will lag once this reservation principle assures them of posts. Conversely, the intellectually developed so called higher castes will get lethargic once they know chances of employment are not bright with all these reservations to a permanently recognised mediocrity. This problem can best be solved by fixing a time limit. From 1950 we have had eight years till now for the backward classes to move forward. May not ten years or at the most 15 years suffice? That is a serious question that legislators must consider if they have the quick progress of the nation at heart.

Titles.

Article 18 envisages the abolition of privileges in the shape of titles. An exception is made in the matter of military and academic distinctions conferred by the State. The Conferral of the title of 'Bharat Ratna' is said to be for special service towards the advancement of art, literature and science and in recognition of public services of the highest order. The 'Padma Bushan' is said to be awarded for distinguished services in any field. The three categories of this 'Pahla Varg', 'Dusra Varg' and 'Tisra Varg', if they are not for academic or military distinctions they may hit against the spirit of Art. 18. In an event a continuous growth of these title holders will lead to another privileges class as the Dewan Bahadur and Rao Bahadurs of the British era. If they are not titles but merely State recognition of meritorious distinction, even then there is no prohibition to the recipients from suffixing or affixing these honorifics to their name cards. While in a socialistic pattern of society we have to subordinate fundamental rights to the interests of the community, a limitation on the confernment of these titles may not be out of place.

Rights to freedom.

The seven freedoms of speech, assembly, association, movement, residence, acquisition and disposal of property and the practice of any profession or trade are vouchsafed by Article 19 which is verily the sheet anchor of Part III of the Constitution.

Freedom of speech : 19 (1) (a).

The limitation to this freedom is set out in Art. 19 (2). There can be restrictions of this freedom in any existing or future law in the interests of security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court and defamation, or incitement to an offence. These restrictions are subject to the yardstick of Reasonableness.

This is but necessary since as Webster puts it[25] 'Liberty is the creation of law essentially different from that authorised licentiousness that trespasses on right . . . . . Liberty exists in "Proportion to welcome restraint—That man is free who is protected from injury". Court in India have applied

25. Websters Works Vol. II P. 393.

the yardstick of reasonableness to statutory limitation of the freedom of speech.

In *Chintamani Rao* v. *State of Madhya Pradesh*[11], it was posited by the Supreme Court that the term 'reasonable restriction' seeks to harmonise the grant of rights in Art. 19 (1) with the social control mentioned in Art. 19 (2). It indicates that the limitations imposed on citizen's right must not be arbitrary or excessive beyond what is actually necessitated by public interest. Therefore the restriction must have a reasonable relation to the object which the legislation seeks to achieve and must never exceed[11]. Reasonableness of the restrictions can be both from substantive as well as procedural standpoints[12]. What is justiciable is only the reasonableness of the restriction and not the reasonableness of the law[13].

The question if the Act provides adequate safeguards against the abuse of the power given to executive authority is not at all considered relevant[13]. *mala fide* abuse of discretionary power is another matter which can invalidate the impugned action and not the Act.

There is no abstract standard or general pattern of reasonableness. The standard varies with the nature of the right injured, the underlying purpose of the proposed restriction, the extent and urgency of the evil sought to be remedied, the disproportion of the imposition and the prevailing circumstances at the time[14].

But there is one snag in this theory of legislative power of restriction. Can restriction include prohibition of the right also? In *Gopalan* v. *State of Madras*[15] Kania, C.J., and Das, J., have held the opinion that restriction does not mean the extinguishment of the entire right. But there can be total prohibition in such matters as for instance dangerous or obnoxious trades, prohibiting dangerously infected persons from entering any particular area, prohibiting lunatics, infants and bankrupts from exercising certain caterings in the interest of public good. In the field of freedom of speech there can be total prohibition of purveying of news during war emergencies. As Narasimhan, J., puts it in *Lokenath* v. *State of Orissa*[16], restriction may be complete or partial and where it is complete it would be absolute prohibition. The word used in Art. 19 (2) is restriction and not 'regulation'. Hence Courts have necessarily to be very vigilant and see that this power of restriction is not abused so as to nullify and abrogate the right itself.

Whether peaceful picketing in political or economic matters and persuasive firm language used in connection thereof is legal, is worthy of consideration. How far can the freedom of speech be restrained in the matter of picketing? After the amendment of Article 19 (2), to prohibit picketing there must be at least danger to public order or incitement to an offence. The duty is heavily cast on the Court to discover if such conditions exist for outlawing picketing in a given case. We say this since in the observations in a Madras case[17]. *In re Vengan,* appear to ban picketing on the ultimate possibility of a strife between North Indians and South Indians in respect of trade. Ultimate possibility is not a sound contention while the question if the present

11. A.I.R. 1959 S.C. 124.
12. *Dr. Khare* v. *State of Delhi,* (1950) S.C.R. 519; *Gurubachan* v. *State of Bombay,* (1952) S.C.R. 737.
13. *State of Bombay* v. *Balsara* (1951) S.C.R. 682.
14. *State of Madras* v. *V. G. Rau* (1952) S.C.R. 597.
15. 1950 S.C.J. 174.
16. A.I.R. 1952 or 42.
17. A.I.R. 1952 Mad. 95.

conditions will tend to disturbance of public order and incitement to an offence can certainly be the proper approach.

In the matter of freedom of the Press, which is also an aspect of freedom of speech, we may say democracy can best thrive under a free Press. But this does not necessarily mean the Press has an unrestricted freedom. The liberty of the Press is no more and no less than the liberty of an individual. The restrictions and limitations applicable to an individual in the interest of the public are equally applicable to the Press. Recently a question arose (the *Search Light case*)[18] if there can be absolute ban on reporting of Parliament's deliberations. We are not referring to secret sessions but public sessions of the Legislature. Such a question brings to the forefront a deadlock the Press claiming Art. 19 (1) (a) as their sheet anchor for the freedom of publication, the Legislature claiming absolute privilege under Art. 194 (3) of the Constitution. The Supreme Court by majority opinion has held that as per Art. 194 (3) since the House of Commons Privileges applied to the Indian Legislature, the latter has the right to ban all publication and the right under Art. 19 (1) (a) is no answer to the bar raised under Art. 194 (3). All that we may state is that while Art. 19 (2) permits limitation of a Fundamental Right in public interest, the right cannot be abrogated altogether or eclipsed by Art. 194 (3). The minority view of Justice Subba Rao was inclined to this view. When two rights appear to contradict each other the rule of harmonious construction should be recognised. Parliament is amply protected if the right under 19 (1) (a) is reasonably restricted by appropriate law under 19 (2). The same rule of harmonious construction must be able to advise us that only 'the existing privileges of the Commons' in 1950 applied to the Indian Legislatures. As the privilege with House of Commons was in disuse for very many decades prior to 1950, it will be possible to construe Art. 194 as not altogether divorced from Art. 19 (1) (a). Parliament can pass the necessary legislation under Art. 194 (3) and soon solve the problem by defining its powers and privileges.

Though it may be stated that both Articles 194 and 19 (1) (a) are not subordinate to each other, yet by applying the rule of harmonious construction, both the rights could function subject to reasonable restrictions.

It has to be remembered that in the ultimate analysis it is the Constitution of India that is supreme over all the three wings of Government, the Legislature, the Executive and the Judiciary. In that view a right guaranteed in Part III of the Constitution can never be subordinate to any other provision of the Constitution except when it is specifically so provided. Parliamentary previleges under Art. 194 cannot override the constitutional guarantees in Article 19 (1) (a).

In *Virendra* v. *The State of Punjab*[18a] the Punjab Powers (Press) Act 1956 was considered vis-a-vis Art. 19 (1) (a) and 19 (2). It has been held that under Articles 19 (1) (a) read with Art. 19 (2) the Executive can be given a discretion to curtail the freedom of speech subject to three limitations: (1) the principle on which this power can be exercised should be laid down by the Legislature, (2) the power should be limited in point of time, that is, the power should be to take action for a limited and short duration, (3) the

18. *Pt. M. S. M. Sharma, Editor of Searchlight* v. *Shri Krishna Sinha;* Petn. No. 112|1958 (Supreme Court) under Art. 32 reported in A.I.R. 1959 S.C. 398.

18a. A.I.R. 1958 S.C. 986.

person aggrieved should have a right of making representation for the consideration of the Executive.

Freedom of Assembly : Art. 19 (1) (b).

Right to freedom of assembly under Art. 19 (1) (b) is ancillary to the first freedom of speech, since unless people freely gather they cannot discuss. The essence of the growth of a democracy lies in free discussion, a sort of a give and take between two opposing views. The limitations on this freedom is that it should be peaceful and without arms. It should also be subject to the State's power to impose reasonable restrictions in the interests of public order [Art. 19 (3)]. The function of the Court is to see that this restriction is reasonable and is applied only when public order is really affected.

In the assertion of a legal right, the citizen should have normal police protection. It will be a travesty of the right if he is prohibited from exercising the right on the score that it will invite opposition from a hostile assembly.

Freedom of Association : Art. 19 (1) (c).

In an age of socialistic Welfare States, the pivot of socialistic organisation is in the freedom of association and union vouchsafed in Art. 19 (1) (c). The only grounds on which this right could be restricted is under Art. 19 (4) are the interest of public order and morality. The term 'public order' is an expression of wide connotation. Mere criticism of the Government cannot affect public order, unless there is an overtact or incitement to disorder : The police power of the State should not be misused to smother formation of associations in furtherance of collective bargaining and advancement of persons employed in labour, agriculture or an industry. This principle was highlighted by the Supreme Court in the *State of Madras* v. *V. G. Rau*[19] where S. 15 (2) (b) of the Criminal Law Amendment Act of 1908 as amended by the Criminal Law Amendment (Madras) Act of 1950 was struck down as *ultra vires* of Art. 19 (4) read with 19 (1) (c).

It is indeed salutary that the test for determining an association as unlawful is objective and not subjective. If it is left to the subjective satisfaction of the Government, then the right to form an association in the Democracy of India will soon degenerate into nothing. The Supreme Court rightly upheld the objective test in V. G. Rau's case.

Right of Movement and Residence : Art. 19 (1) (d).

The right to move throughout the territory of India [Art. 19 (d)] and the right to reside and settle in any part thereof [Art. 19 (c)] are subject, under Art. 19 (5), to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe. The term 'in the interests of the general public' in Art. 19 (5) is wider in import than any of the expressions used in Art. 19 (2) to (4). It embraces public security, public order and public morality. As Shah, J., put it in a Bombay case[20], "The scheme of Article 19 is to provide a balance between the security of the State and the interests of the general public on the one hand and the Fundamental Rights guaranteed to the citizen on the other ..... If the Court is satisfied that the restriction is imposed in the interests of the general public and the restriction is not unreasonable, the Court has no justification whether in the manner in which the restriction is likely to be imposed by the officer charged with the duty of enforcing it may possibly act unreasonably."

19. A.I.R. 1952 S.C. 196. 20. A.I.R. 1950 Bom. 368.

Such possibilities of abuse of a power is for the Legislature to curb by adequate safeguard.

The decisions in *Dr. Khare* v. *Delhi*[21], *Gurubachan* v. *Bombay*[22], *Bhagabhai* v. *Dist. Magistrate*[23] and *Hari* v. *Dy. Commr. of Police*[24] reveal certain interesting features. They make it clear that a law authorising the executive to extern a person in its subjective satisfaction should provide certain procedural safeguards. But they do not give any clear guidance as to the procedural limitations for guiding the exercise of administrative discretion. In Dr. Khare's case, cases of externment for more than three months had to be referred to an Advisory Board. The Board's opinion was however not binding on the Government. But in the Bombay cases of *Gurubachan, Hari,* and *Bhagabhai* the externment order could be had upto a period of two years and there was no Advisory Board functioning. In fact the Supreme Court rejected the argument in *Hari's case* that there was no universal rule that the absence of an advisory board was unconstitutional. In these cases the only safeguards assured was the right of hearing to the externee. But this was indeed a very weak safeguard since the role of the prosecutor and the judge was played by officers of the police department itself. In *Khare's case* there was a right of representation extended but there was no oral hearing. In matters of externment, all that is assured to the externee is that he has a right to be appraised of the grounds and given a right of representation or a hearing. The hearing is before an executive officer. The approval of these by the Supreme Court in the above cases points to a needlessly great latitude extended to executive discretion by legislative sanction. Indeed the executive can hamper individual liberty of movement and residence to a very great extent. It also looks peculiar that while in the matter of the right of association, a judicial probe was found necessary, in the matter of the right of movement, not even an Advisory Board was deemed necessary. Executive discretion is given full play with little check. In the case of preventive detention, an Advisory Board was deemed however necessary though a judicial safeguard would have been more useful. Though the right of association is a basic right demanding full judicial vigil, it appears to us that preventive detention also calls for such a safeguard and should not be satisfied with a nominal powerless Advisory Board. The right of movement has the worst treatment and needs better protection as stated forcibly by the dissenting judgment in *Dr. Khare's case.*

Passports.

In the matter of passports, we should like to mention the implications of Art. 13 (2) in the Universal Declaration of Human Rights where it is stated, "Everyone has the right to leave any country including his own and return to his country". Oppenheim remarks[25], "The matter of passports is absolutely in the discretion of every State ..... This right of exit depends for the great majority of the world's people on the ability to secure passports ..... The denial of passports to its citizens has long been one of the principal instruments of intimidation and of control used by totalitarian governments. Every American citizen has a constitutional right to a passport and the protection of this right has become an urgent matter of national policy as well as of civil liberty. If our preaching is to accord with our practice, that right should be

21. A.I.R. 1950 S.C. 211 : (1950) S.C.R. 519.
22. A.I.R. 1952 S.C. 221 : (1952) S.C.R. 131.
23. A.I.R. 1956 S.C. 585 : (1956) S.C.R. 533.
24. A.I.R. 1956 S.C. 559 : (1956) S.C.R. 506.
25. 'International Law', 7th Edn., Vol. 1, p. 626.

curtailed only for good cause and with that regard for fairness embodied in the phrase 'Due Process'. Nothing less will achieve the objective envisaged in the Universal Declaration of Human Rights—free travel in World Society[26]."

All that we wish to say is, in India there is no law which gives a right to obtain a passport. It is entirely left to the discretion of the Government which has to consider it amidst the complexities of Government political policies and often on its effect on international relations. But it will be well if the right of an Indian citizen regarding passports is clearly regulated and made justiciable by appropriate legislation under Entry 19 of List 1, Sch. VII of the Constitution. Otherwise the limitation on the Fundamental Right to move may become too onerous depending on its relaxation on the quicksands of executive discretion.

Freedom of Property : 19 (1) (f).

The freedom to acquire, hold and dispose of property [Art. 19 (1) (f)] is subject to any law imposing reasonable restrictions under Art. 19 (5) either in the interests of the general public or for the protection of any Scheduled Tribe. The protection of the freedom in Art. 19 (1) (f) is only against State action[27]. While Art. 19 (1) (a) to (c) read with Art. 19 (4) referred to restrictions in the interest of 'public order' Art. 19 (6) refers 'in the interests of the general public' which is clearly a larger field, including not only 'public order' but also whatever tends towards the common good and advances the social or economic betterment of the public at large.

Art. 39 (b) and (c) outline what is common good and what is common detriment. The Directives of State Policy in Art. 39 (b) is to ensure that the ownership and control of material resources of the community are so distributed as best to subserve common good. It should be the State's policy [*vide* Art. 39 (c)] that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

'Interests of the general public' may sometimes even involve total prohibition of the right to property. Thus the State may be driven to the necessity of destroying filthy dwellings to root out epidemics as plague. Sometimes some houses have to be dismantled to prevent further conflagration[28]. Confiscation of contraband goods is another instance. There can be taxation of private property to augment public finance. Prohibition of sale of property affecting public health is necessary, *e.g.*, liquor and adulterated food. 'Reasonable restrictions' is the sheet anchor in Art. 19 giving scope for judicial review. The term connotes that the limitation imposed in enjoyment of the right should not be arbitrary or excessive beyond what is actually required in the interests of the public.

It may be stated that judicial review has had a beneficial effect to some extent in restricting the scope of the discretion which the Legislature can confer on the Executive to interfere with the citizen's right to property. A law which attempted to deprive a person of possession of his property for an indefinite period with no recourse to redress in civil courts was struck down in *Raghubir* v. *Court of Wards*[29]. For in the instant case it was left to the sub-

26. *See* 'Yale Law Journal' 1952 Feb. on Passport Refusal for Political Reasons, cited in 1953 (2) M.L.J. at 420.
27. *P. D. Shamdasini* v. *Central Bank of India*, A.I.R. 1952 S.C. 59.
28. 12 Cok p. 13.
29. A.I.R. 1953 S.C. 372 : (1953) S.C.R. 1049.

jective satisfaction of the Executive whose pleasure and discretion alone governed the matter. Similarly a state law which gave power to the executive to frame a scheme of management for endowed property with no recourse to judicial redress at any stage was also struck down as an unreasonable restriction[29a]. But in an analogous case where right to institute a suit was recognised the Supreme Court upheld the scheme framed by an executive officer[29b]. It may be added that in the last case [29b] another provision which gave power to the executive officer to take over the administration of the property in his discretion with no judicial safeguards was struck down by the Supreme Court. In cases[29c] arising under the Government Premises (Eviction) Act 1950 [recently reenacted as the Public Premises (Eviction of Unauthorised Occupants) Act 1958] since the statute barred recourse to court and allowed only an appeal to the Central Government as a useless solatium those provisions were declared *ultra vires*. For the executive officer was given all the discretion to evict a person and also to award damages for unauthorised occupation of the premises.

On the whole it must be stated that courts were able to give effective protection in so far as the right pertaining to Art. 19 (1) (f) is concerned.

Reasonableness of Taxation.

In this connection we have to advert to the important aspect of taxation vis-a-vis Fundamental Rights. Though protection against imposition and collection of taxes by authority of law comes directly under Art. 265 and not under Part III of the Constitution[29d] a question arises whether reasonableness of a taxing law can be reviewed under Art. 19 (1) (f). We may say it can be gone into if the taxing law or the application of the law is so unreasonable as to obliterate the Fundamental Right to property or profession. The Andhra Pradesh High Court stated in *Pithapuram T.T.C. and S. M. Union* v. *State*[30] that even taxation can be questioned as affecting one's Fundamental Right following a profession, in extreme cases. If the substance of the legislation is such that the taxes imposed are prohibitive or have the effect of imposing unreasonable restrictions, the constitutionality of the Act can be examined under Art. 19 (6). But this dictum of Andhra Pradesh High Court has not been put to test in any concrete case so far. In any event the freedom to own property [19 (1) (f)] or to practise a profession [19 (1) (g)] should not be rendered impossible by the imposition of onerous taxes. While taxation is a recognised special power of the State, the application of it should not lead to an extinction of a Fundamental Right. In such extreme cases the power of Court to assess the reasonableness of a taxing statute under Art. 19 (6) must indeed be recognised. What is onerous taxation and how can the Court have the necessary expertise to go into an evaluation of the matter are also further matters for consideration.

Freedom of Profession, Trade etc. [Art. 19 (1) (g)].

The freedom under Art. 19 (1) (g) to practise any profession, or trade or any occupation is subject, under Art. 19 (6), to the State's power of legislation

29a. *Jagannath* v. *State of Orissa*, A.I.R. 1954 S.C. 400: (1954) S.C.R. 1046.

29b. *Commissioner, Hindu Religious Endowments* v. *Lakshmindra*, A.I.R. 1954 S.C. 282: (1954) S.C.R. 1005.

29c. *Satishchand* v. *Delhi Improvement Trust*, A.I.R. 1958 Pun. 1 : *Jagu v. Shankat*, 58 C.W.N. 1066; *Brig. Commr., Meerut* v. *Ganga Pd.*, A.I.R. 1956 All. 507.

29d. *Ramjilal v. I.T.O.*, (1951) S.C.R. 127.

30. A.I.R. 1958 Andh. Pra. 888.

reasonably restricting in the interests of general public. A law specifying professional or technical qualifications for the profession or nationalising wholly or partially, the trade, business etc. are also further restrictions on the freedom.

The term 'in the interests of general public' embraces public order and public morality. A determinable section of the general public is enough for the application of restriction. The test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness is available. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time shall all be considered by the Court sitting in review[31]. The restrictions should necessarily have a reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object.

As stated by the Supreme Court in *Chintamani Rao* v. *Madhya Pradesh*[32] the restrictions sought to be imposed on the right envisaged under Art. 19 (1) (g) should be solely in the interests of the general public. It cannot be arbitrary or excessive. A reasonable relation between the provisions of the law and the purpose in view was called for in order to strike a proper balance between social control and the individual's guaranteed rights. The regulation has to be both in the substantive as well as the procedural parts. In respect of 'normal' trade occupations the regulation has to be by recognised rules and should not be arbitrary. Concentration of discretionary power in an authority without check or control by higher authority is taboo[33].

If the grounds on which a discretionary power can be exercised are stated or if a definite policy is laid down for the exercise of discretion, there is deemed to be proper regulation[34]. Procedural safeguards are also needed to prevent misuse of the discretion[35]. In respect of the Essential Supplies Act (Sec. 3), in a Rajasthan case[34] freezing of foodgrains was held justified to secure equable distribution. But the power of requisition at any price and sell it at any price was struck down as unreasonable in the same case[34]. In the Bijoy Cotton Mills case[35] the Minimum Wages Act was upheld as securing living wage to labourers. Such a wage ensures physical subsistence as well as health and decency which are all beneficial to the public, in accordance with the directive principle stated in Art. 43.

The said act was held also to contain adequate procedural safeguards through the machinery of advisory boards to advise the centre and the state in regard to the fixation of wages. In the case of executional trades, *e.g.*, hedging contracts in cotton, regulation can in public interest even extend to told prohibition for a time[36]. Cotton is a commodity essential to the life of the community.

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31. *Virendra* v. *State of Punjab* A.I.R. 1957 S.C. 896 relies on A.I.R. 1952 S.C. 196.
32. *Chintamani Rao v. Madhya Pradesh,* A.I.R. 1951 S.C. 118.
33. *Dwarka Prasad* v. *State of Uttar Pradesh,* A.I.R. 1954 S.C. 224: (1954) S.C.R. 803.
34. *Rajasthan* v. *Nathmal,* A.I.R. 1954 S.C. 307 : (1954) S.C.R. 892; *Virendra* v. *Punjab,* A.I.R. 1957 S.C. 896.
35. *Bijay Cotton Mills* v. *Ajmer,* A.I.R. 1955 S.C. 99: (1955) S.C.R. 752.
36. *M. B. Cotton Association* v. *Union of India,* A.I.R. 1954 S.C. 634.

In the area of trade, licensing is necessary in public interest. It is an administrative function[37]. Licensing has necessarily to be regulated and no authority should be vested with absolute powers of discretion[38]. An arbitrary power to grant, modify or refuse or cancel a licence is unreasonable[38]. Regulatory rules or principles should be available to guide the Authority, lest injustice result from improper exercise of the power. Mere recording of reasons for grant or refusal of licence without an appeal to a higher authority is nothing but giving the seal of approval to the Authority's subjective satisfaction[38]. To impose unreasonable conditions for issuance of licence is taboo[39]. An absolute discretion to revoke a license is also taboo[40].

But generally speaking definite standards have not been formulated for controlling administrative discretion. Each case was dealt with by the courts on its merits. Of course in *Dwarka Prasad's case* it was urged that mere recording of reasons without review by a higher authority was not wholesome. As the Calcutta High Court has suggested[41] a right of representation to the party concerned against the action of the administration is necessary[42] as also the need for recording of reasons for the order. That will enable the supervisory authority to determine if the order was *mala fide* or arbitrary. A right of hearing[43] as well as the facility for review by a judicial or quasi judicial body is necessary and this area requires much consideration at the hands of legislators. In the matter of abnormal or exceptional trade, such as selling liquor, adequate discretionary powers may be necessary for the licensing authority. Sometimes such trades have not only to be regulated but prohibited if the interest if the public demands the same. The Supreme Court recognised the vast discretionary powers in the Excise Commissioner as valid in *Cooverjee* v. *Excise Commission*[44]. But the court could have insisted on at least procedural safeguards in that case. This is an area where judicial review can help a lot.

The prohibition on private trade by introducing state monopoly is in the general scheme of a Welfare State. But unless private trade has reached its zenith of perfection and success, it is not wise for the state to step in. Once the state steps in, there is a certain amount of lack of enterprise and efficiency creeping in. So it is, we must advocate that no trade or business should be nationalised unless that particular trade or business has reached its zenith in the private sector. Else the objective of greater production and greater common good in a Welfare State will be stalemated. This criterion has to be considered before interfering with the citizen's personal right to carry on a particular trade, business or occupation.

As we have already adverted to, the State's power of taxation should not be extended to the point of annihilating or nearly crippling the citizen's individual freedom to trade or profession. Can a writ lie in such cases under Art. 327, In *Laxmanappa* v. *Union of India*[45] and *Ramjilal* v. *I. T. O.*[46] the Supreme

37. *Nakudali* v. *Jayaratne,* 1951 A.C. 66.
38. *Dwaraka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 224: See *Seshadri* v. *Dist. Magistrate,* A.I.R. 1954 S.C. 747.
39. *Shesadri* v. *Dist. Magistrate,* A.I.R. 1954 S.C. 747.
40. *Ganpati* v. *Ajmer,* A.I.R. 1955 S.C. 188.
41. *Anulathi* v. *Chatterji,* A.I.R. 1951 Cal. 90.
42. *Rameshwar* v. *Dist. Magistrate,* A.I.R. 1954 All. 144.
43. *Nakudali* v. *Jayaratne,* 1952 S.C.R. 873.
44. A.I.R. 1954 S.C. 220 : (1954) S.C.R. 873.
45. (1955) 2. S.C.R. 303.
46. (1951) S.C.R. 127.

Court has held that the special provision under Art. 265 that no tax shall be levied or collected except by authority of law cannot be attacked under Art. 32, Art. 31 (1) has also to be regarded as concerned with deprivation of property otherwise than by imposition or collection of tax. But as we have already stated a clear provision must be made to strike down a tax law which unreasonably abrogates altogether a Fundamental Right to trade or profession[47].

Protection in conviction for offences.

Art. 20 affords a triple protection to an accused. He cannot be convicted of any offence under any law not in force at the time of commission of the offence.

1. He cannot be subject to a greater penalty than that which might have been inflicted under the law in force at the time of the commission of the offence (*Expost facto* Law).
2. He cannot be prosecuted and punished for the same offence more than once.
3. He cannot be compelled to be a witness against himself.

It is in the third category that a heavy duty is cast on the Courts to zealously guard the rights of the accused. Often very clever evasions of the rule are attempted : (a) issuance of notice to an accused to show cause against search of his premises for certain incriminating documents[48], (b) a direction by Court asking the accused to give his thumb impression[49] and (c) giving notice to the accused to produce in Court the document impugned as forgery[50].

Protection of Life and Liberty.

Art. 21 guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law. The American process of 'due process of law' was not accepted by our Constitution makers. But really judicial review is limited in the concept of 'procedure established by law' while the 'due process concept' can give substantial corrective to executive or administrative arbitrariness.

As Willis put it "The guarantee of Due Process of Law is so all-inclusive that all constitutional guarantees could be abolished and there would still be sufficient protection to personal liberty. Due process applies to personal liberty, social control, procedure, jurisdiction and substantive law ..... No better scheme could have been evolved to permit the Supreme Court to strike the proper balance between personal liberty and social control".

It may be noted that in Part III of the Constitution the major area for review is only under the category of Reasonableness of restrictions of Fundamental Rights and the due observance of the procedure established by law. But this is indeed a narrow field and the citizen may be given a better deal by allowing him the protection of some such clause on the pattern of "due process"

47. *Vide* observations in *Pithapuram T.C.C. & S. M. Union* v. *State*, A.I.R. 1958 Andh. Pra. 888.
48. *Somalingam Chettiar* v. *Assistant Labour Inspector*, A.I.R. 1956 M. 165 [held *ultra vires*, of Art. 20 (3)].
49. *Shark, Mohd. Hussain* v. *State*, (1956) 2 M.L.J. 427.
50. *Krishna Kesavan* v. *State of Kerala*, A.I.R. 1957 Kerala 78.

clause" of America. This appears more necessary as what is 'reasonable' is in the discretionary judgment of the Judiciary. If Judicial Review in this sphere is not narrow to the prejudice of the citizen's fundamental rights, the position indeed may be different.

One eminent scholar writing on 'Missed Constitutional Opportunities'[52] stated: 'In regard to Fundamental Rights the Supreme Court is expected to be "a sentinel on the *qui vive*" to use the felicitous expression of Patanjali Sastri, C.J., but it passes one's comprehension how it can fulfil that expectation with the crippling interpretation of Art. 21 which it has adopted. One can but feel that a great constitutional opportunity which cannot easily recur was missed.' If the word 'Law' in Art. 21 had been interpreted to mean not only statute law but also rules of natural justice, then the citizen would have been assured the kernal of personal liberty. If Law is regarded as merely the ordinary well-established Criminal Procedure then personal liberty will only be a plaything of the Legislature[52]. Under Art. 21 no law can be questioned on account of its unreasonableness. In *State of Punjab* v. *Ajaib Singh*[53] a girl was detained in a camp for abducted persons under the provisions of the Abducted Persons (Recovery and Restoration) Act 1949. The petitioner filed the *Habeas Corpus* application challenging the constitutionality of the Act on the ground of deprivation of liberty with no reasonable safeguards such as production before a magistrate, permission to consult counsel etc. Though the Supreme Court in the instant case realised the hardship, it could not invoke Art. 22 since it was not a case of arrest on accusation of offence or of preventive detention. The only other Article (21) was of no avail since under it the unreasonableness of the law could not be questioned. What then is the value of personal liberty as a Fundamental Right if the reasonableness of the law endangering such liberty cannot be questioned. The field of 'procedure established by law' is too narrow a ground to be of much utility.

Protection against arrest and detention.

Art. 22 provides certain safeguards, namely that an arrested person should be produced before a magistrate within 24 hours, and that he should be informed 'as soon as may be' the grounds for his arrest [(Art. 22 (1) and (2)]. But in Article 22 (3) the concept of Preventive Detention for three months before which his case has to be examined by an Advisory Board on the latter's recommendation, detention can be without trial for a maximum period of one year. Detention under the Preventive Detention Act of 1950 can be to the subjective satisfaction of the Government that the detenu's acts are prejudicial to the defence of India, or the security of the state or maintenance of supplies and services essential to the community.

In England detention is a war-time measure but in India we have it as a peace-time measure constitutionally recognised in Art. 22. The Act has had a legislative revival from 1950 'every three years'. The theory of subjective satisfaction of the authority has been carried too far throttling all judicial review. It is suggested that if the Advisory Board's decision is a 'speaking order' subject to judicial review on fact and law to the High Court, it will yield some protection to the detenu. The detenu may also be allowed to engage counsel before the Advisory Board. It may be, the political conditions in the country have not produced an atmosphere wherein the ruling party or the

52. Pro. G. C. Venkata Subba Rao in 'The Year Book of Legal Studies' 1958, Govt. of Madras, pp. 20-21.
53. (1953) S.C.R. 254.

opposition is fully trained in democratic outlook. Maybe political rivals are an anathema to the party in power. Maybe the statute of the rank and file of the ruling political party is not of high calibre and therefore must needs be protected from rival forces by such detention acts. But whatever the reason it is high time we grow in stature and remove this blot of detention without trial. At any rate if we have to have it, let us at least provide adequate safeguards for judicial correctives. To have detention without trial is indeed a pathetic presentation of the working of democracy in the Republican Welfare State as India. The safeguards afforded are not real. Often it is a mere phantom.

To sacrifice the personal liberty of a citizen at the altar of the subjective satisfaction of a detaining authority and keep that liberty in suspense for a period extending to one year is an ugly and unhappy episode in the history of Indian Democracy. No objective standards are set up by the Legislature for detention[54]. There can be no court scrutiny of the sufficiency of grounds on which the satisfaction of the authority detaining rests[55]. It cannot examine if the grounds are false or true[56]. But it is possible for the court to determine if the grounds are relevant to the objectives of the law which empowers detention[57]; or whether the grounds are so vague or indefinite that it is difficult for the detenu to make an effective and adequate representation[58]; whether the particulars furnished are sufficient to enable adequate representation[59]; whether more than reasonable time has been taken for furnishing the grounds to the detenu[60] or whether detention order was made *mala fide*[61]. If one of the grounds is wague the order of detention can be struck down[59]. The tendency of the Supreme Court must not be to relax this last rule[61]. Within the limited scope for judicial review for preventive detention, it is necessary that none of the grounds should be vague as it is difficult to predicate on which ground the detention order is really based. Judicial review is indeed very narrow in the matter of detention orders. It is confined to a few procedural matters only. It is betimes the law of preventive detention is either scrapped (at any rate in peace time) or adequate court review be provided. Article 22 instead of being the minimum safeguard for ensuring personal liberty appears to be the maximum. For outside detention, there is a vast area in civil liberty to be safeguarded in the matter of procedural safeguard[61] and the unreasonableness of a law.

Articles 23 and 24.

Article 23 relates to prohibitions of traffic in human beings and forced labour while Article 24 enjoins that no child below 14 years of age should be employed to work in any factory or mine or engaged in any other hazardous employment.

Freedom of Religion.

Article 25 guarantees the freedom of conscience and free profession, practice and propagation of religion subject to the restriction of public order, morality, health and other provisions in Part III of the Constitution. Art. 26 deals

54. *A. K. Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27.
55. *Bombay* v. *Vaidya*, A.I.R. 1951 S.C. 157.
56. *Ujjar Singh* v. *Punjab*, A.I.R. 1952 S.C. 350.
57. *Ujjar Singh* v. *Punjab*, A.I.R. 1952 S.C. 350.
58. *Bombay* v. *Vaidya*, A.I.R. 1951 S.C. 157.
59. *Ramakrishna* v. *State of Delhi*, (1953) S.C.R. 708.
60. *Ujjar Singh* v. *State of Punjab*, A.I.R. 1952 S.C. 350.
61. See *State of Punjab* v. *Ajaib Singh*, (1953) S.C.R. 254.

with freedom to manage religious affairs, to establish and maintain institutions for this purpose, while Art. 27 postulates the freedom as to payment of taxes for promotion of any particular religion. Article 28 stipulates the freedom as to attendance at religious institutions or religious worship in certain educational institutions.

But really the State in India does interfere with religious institutions where property is concerned. This is inconsistent with the theory that there should be a wall of separation between church and state[62]. Thus Art. 16 (5) recognises the validity of laws relating to management of religious and denominational institutions. Art. 28 (2) contemplates the state itself managing educational institutions wherein religious instructions are to be imparted.

Protection of interests of minorities.

The cultural and educational rights of distinct minority groups of Indian citizens are protected by Article 29 while Article 30 refers to rights of minorities to establish and administer educational institutions for their own benefit. But on this account no citizen of any other minority or faith can be denied admission only on the ground of sex, race, religion or caste. Thus a non-Anglo-Indian cannot be denied facilities for learning through the English medium in an institution established and managed for Anglo-Indians[63].

Right of Property.

Art. 31 formulates the following :

1. No person shall be deprived of his property, save by authority of law.

2. The compulsory acquisitioning or requisitioning of property should be for a public purpose.

3. The law enacted in this behalf should fix the amount of compensation or specify the principles on which and the manner in which the compensation is determined and given. No such law can be questioned in any court on the ground that the compensation provided by the law is not adequate.

This is clearly a departure from the old law, and the Fourth Amendment of 1954 has effected this change, obviously with the objective to speed up acquisition for public purposes. Art. 31 clause (5) of course excepts all 'existing laws' such as the Land Acquisition Act I of 1894. But that the principle of just and equitable compensation should be dropped in all future laws and that the executive discretion should be left undisturbed, in the matter of quantum of compensation are indeed rather arbitrary.

A leading English statesman went so far as to state that discretionary powers in the hands of the judiciary is one form of tyranny. Certainly the case of executive discretion subject to no judicial review is the worst form of tyranny.

It is not a fair deal at all to the citizen who has the misfortune to possess the property to be acquired. This arbitrary limitation

62. *Narayana Nambudripad* v. *State of Madras*, A.I.R. 1954 Mad. 385. See *Ratilal* v. *State of Bombay*, A.I.R. 1954 S.C. 308.

63. *The University of Madras* v. *Shata Bai*, A.I.R. 1954 Mad. 67; *Bombay Education Society* v. *State of Bombay*, A.I.R. 1954 Bom. 468, *Ibid.* A.I.R. 1954 S.C. 560 (561).

on the freedom to own property is rendered constitutionally valid by Art. 31 as amended.

While the amended Article enjoins on the Legislature to fix the compensation or to specify the basis for its determination, there is too much discretion left to the executive authority to awarding any damages it liked. Maybe as in *Rajasthan* v. *Nathmal*[64], a law which allows the officer to fix any price for the seized foodgrains can be struck down as no policy for such fixation is laid down in the impugned statute. This could be circumvented by laying some basis but yet the officer could award little damages which will amount practically to no damages. The justiciability of compensation had been a real safeguard and it is a pity that the Legislature has taken away that safeguard, sanctified as it was by a constitutional amendment of Art. 31. As we have stated already in our comment on Art. 13, if only 'law' included 'constitutional law' and not merely statute law, then the Chapter on Fundamental Rights could have been preserved *in toto* without being subject to periodical mutilation at the hands of over-zealous reformers in their zeal for speedy socialization.

In the field of 'public purpose' it is made an objective test and is justiciable. So far so good. But the difficulty is in assessing what is a public purpose. In *State of Bombay* v. *Nanji*[65] requisition of a building for residence of an employee of the State Road Transport Corporation has been held to be a public purpose. A broad interpretation of the term 'public purpose' will indeed place a large amount of discretion in the hands of the executive. Cannot the legislature be enjoined to specify the purpose in the body of the statute itself. Vague expressions as 'purposes of the State or 'purposes of the Union' yet leave large discretionary powers to the acquiring authority. So the duty falls heavily on courts to examine each case with a view to checking the exercise of the discretion so largely vested in the executive by the Legislature. The courts should apply clear standards and may not not be satisfied with such things as 'general intendment of the statute' or 'purpose inferable from the preamble'. They may insist on clear words indicative of the purpose of acquisition in the body of the statute.

Constitutional Remedies.

The right to move the Supreme Court by appropriate writs of *certiorari*, prohibition, *mandamus* etc., exist for any person affected (even a non-citizen) by an infringement of any of the Fundamental Rights in Part III of the Constitution by state action. Similar remedies are available under Art. 226 in the High Court for the enforcement of all rights inclusive of Fundamental Rights.

But we have to point out that since Art. 32 is itself a Fundamental Right a direct approach to the Supreme Court in all cases should be real. Thus the trend of judicial decisions throw out a problem as to whether there can be a resort to Art. 32 when a petition on similar grounds was dismissed under Art. 226 and no leave to appeal was granted. No authoritative decision of the Supreme Court is available on this point[66] though we are strengthened in our position by the observations in a Bombay[67] and an Assam case[68].

64. A.I.R. 1954 S.C. 307.
65. (1956) S.C.R. 18.
66. See *Aswini* v. *Arabinda*, 1953 S.C.R. 1 at 5 where this problem was left open.
67. *In re* Prahlad Krishna Kurve, A.I.R. 1951 Bom. 25.
68. *Himanshi Bimal Mitra* v. *State*, A.I.R. 1951 Assam 143.

Waiver of Fundamental Rights.

With all the limitations to Fundamental Right, the substratum of right if they are allowed to be contracted out, it will indeed be a tragedy. Undue influence or coercion may easily make the dominant will to have an undue ascendancy over the servient person. But Fundamental Rights if they are to be Fundamental cannot be bartered or contracted out.

As pointed out in *Mahbub Begum* v. *Hyderabad State*[69], these rights are not set out in the Constitution merely for individual benefit. They exist also as a matter of public policy and hence the doctrine of waiver cannot come into play at all. Thus Arts. 15 (1), 20 and 23 make the proposition plain. A citizen cannot get discrimination by telling the state you can ' discriminate ' or get convicted by waiving the protection of, say Article 20 or 21[69]. The Supreme Court has affirmed this principle in *Bisheshar Nath's case*[70] and Nani Suth Das case[71].

When waiver cannot be legal for an individual it may be stated that the concept of Fundamental Rights should not be contracted out even by the State by resorting to the devise of constitutional amendment. The charter loses its value if it is to be tinkered often by hasty reformers who bank on the adventitious aid of sheer political majority. The majority of today may be the minority of tomorrow and so a healthy convention is needed to respect the charter enshrined in Part III of the Constitution.

CONCLUSION.

In the ultimate analysis of Law and Democracy while Democracy in a Welfare State does call for some subordination of the individual's interest in favour of society as a whole, we should nevertheless stress that the essence of democracy consists in the individual citizen's dignity being duly respected. This will certainly vanish if the stress is more on limitations of rights than the assertion of rights. The former is the *sine qua non* of countries imbued with a totalitarian outlook. In democracy a workable harmony must be established between rights and restrictions one not eclipsing the other. A vigilant public, a legislature manned at least by two nearly equal political parties, a strong bar and a robust judiciary are the four pillars required to guard the sacred temple of Democracy.

— End —

69. A.I.R. 1951 1 Hyd. 1 (F.B.)
70. *Bisheswar Nath* v. *Commissioner of Income-tax* A.I.R. 1959 S.C. 149.
71. *Nain Suth Das* v. *State of U.P.*, A.I.R. 1953 S.C. 385.

INDEX

A

B

C

D

E

F

G

H

I

J

K

L

Q

R

S

T